UNIVERSITÀ DEGLI STUDI DI MILANO

DIPARTIMENTO DI
SCIENZE SOCIALI E POLITICHE

PhD Dissertation

THE LEGAL IMPLICATIONS OF THE SOCIAL MARKET ECONOMY ON THE EUROPEAN ECONOMIC CONSTITUTION

by

Kenan Ertunc

Supervisor: Professor Massimo Pallini

PhD Coordinator: Professor Lorenzo Bordogna

Graduate School of Social and Political Sciences

UNIVERSITÀ DEGLI STUDI DI MILANO

Academic Year 2012-2013

March 24, 2014

UNIVERSITÀ DEGLI STUDI DI MILANO

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_____
(Member: Professor Roberto Pedersini)

_____
(Member: Professor Fabrizio Montanari)

Date: _____

THE LEGAL IMPLICATIONS OF THE SOCIAL MARKET ECONOMY ON THE EUROPEAN ECONOMIC CONSTITUTION

(A DISSERTATION SUBMITTED TO THE DEPARTMENT OF SOCIAL AND POLITICAL
SCIENCES IN PARTIAL FULFILLMENT OF THE REQUIRMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY IN ECONOMIC SOCIOLOGY AND LABOUR STUDIES)

by
Kenan Ertunc

Supervisor
Professor Massimo Pallini
Department of Social and Political Sciences
Università degli Studi di Milano, Milan, Italy

PhD Coordinator
Professor Lorenzo Bordogna
Department of Social and Political Sciences
Università degli Studi di Milano, Milan, Italy

March 24, 2014

To my beloved parents, mother Gülizar Ertunc and father Ilyas Ertunc

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A. Introduction

When the Treaty of Rome came into force in 1957, its main focus was to ensure peace between the Member States of the then European Economic Community(hereinafter EEC) by creating a single market where free movement of goods, persons, services and capital was provided. The focus of the EEC Treaty was mainly on the opening up of national economies to transnational cooperation and thus on economic integration. On the other hand the founding Member States deemed it not necessary to harmonize their social models. This resulted in a decoupling of economic integration and social protection. While at Member State level economic and social policy continued to have equal constitutional status, it was economic policy that prevailed at Community level. In the course of time, this clear cut boundary between transnational economic integration and national social protection has been blurred. The advancement of European integration and associated therewith the many Treaty amendments have gradually increased the social competences of the EU, though without seriously touching the autonomy of the Member States on their social models. This, however, has changed in recent years. This development goes mainly back to the Court of Justice of the European Union(hereinafter CJEU) which has expanded the scope of application of the derivable rights from the European economic constitution to the detriment of the social models of the Member States. To be more precise the CJEU caused a great deal of commotion by handing down various judgments concerning conflicts of fundamental market freedoms with national social rights. It showed in these cases a clear attachment to free market thinking by giving fundamental freedoms priority over national social rights. In the cases Viking[1] and Laval[2] the right to strike was held to be inferior to the economic freedoms in the European market economy. In Rüffert[3], based on the same line of reasoning the Court prohibited a German regional government to impose social conditions on public procurement. In

[1] CJEU Case C-438/05 ITF v Viking Line ABP 2007, ECR I- 10779.
[2] CJEU Case C-341/05 Laval v Svenska Byggnadsarbetareförbundet, 2007 ECR I- 11767.
[3] CJEU Case C - 346/06 Dirk Rüffert v Land Niedersachsen 2008 ECR I-1989.

Commission vs. Luxemburg[4], the CJEU prohibited a Member State to require higher labour standards for the employment of foreigners than provided in the EU Directive on Posted Workers(hereinafter PWD). These judgments are generally traced back to the pre- Lisbon version of the European economic constitution which was based on an open market economy with free competition. This market economic orientation supported amongst others a substantial and procedural precept of rule and exception, favoring the freedom on the market at the expense of social state interventions of the Member States. With the coming into force of the Lisbon Treaty in December 2009 the question about the relation of the freedom on the market and state interventions must be asked anew again. This has amongst others to do with the fact, that the open market economy with free competition was replaced by the highly competitive social market economy. Article 3 III of the Treaty on the European Union (hereinafter TEU) has the following wording:

> " The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".

Against the background that the systematic decision in favour of an open market economy played a significant role for the European economic constitution prior to Lisbon, the question comes up, which implications the constitutionalization of the social market economy has. The answer to this question depends in the first place on the meaning of the social market economy. As is well known, the concept of the social market economy originated in Germany. This could imply that the social market economy, according to Article 3 III 2 TEU, is equivalent with the original concept of the social market economy. It must be born in mind, that the social market economy in Germany is associated with different meanings. Accordingly, there is a difference between the ideal and real type of the social market economy. In regard of the former, the concept of the social market economy consists of two different but complementary approaches, namely

[4] CJEU Case C- 319/06 Commission v Luxembourg 2007 ECR I - 4323.

ordoliberalism and Alfred Müller- Armack´s concept of the social market economy. Ordoliberalism is a well known and important concept in the European integration process since it served as a model for the drafting of the Treaty of Rome in 1957. In order to define the social market economy according to Article 3 III 2 TEU, the original concept of the social market will be first investigated. Subsequently and against the background that the overall aim of the work is to analyze the legal implications of the social market economy on the European economic constitution it will have to be analyzed in how far the social market economy is reflected in the economic constitution of the German Basic Law and associated therewith in the case law of the German Federal Constitutional Court (Bundesverfassungsgericht, hereinafter BVerfG). In regard of the latter, a case study of the BVerfG will be elaborated in order to gain information how the resolution of conflicts between economic and social interests takes place. The acquired findings will then be utilized as an interpretation tool for defining the social market economy in Article 3 III 2 TEU. Accordingly, the findings will be used to investigate the legal implications of the move from the open market economy towards the social market economy for the Lisbon version of the European Economic Constitution. The focus of the investigation will be on two aspects, first, the implications of the social market economy on the material content of the European economic constitution, and secondly on the legal reasoning of the CJEU. The latter will also comprise a case study in which the CJEU had to deal with restrictions of fundamental market freedoms on ground of social state interventions. This case study will be split in two parts. In the first part it will be dealt with cases which were handed down by the CJEU in the pre-Lisbon era. In the second part then, cases belonging to the post- Lisbon era will be analyzed. The aim of the case study is to examine, whether with the coming into force of the Lisbon Treaty the legal reasoning of the CJEU has changed and if so, whether this is attributable to the constitutionalization of the social market economy as an objective of the European Union.

B. The Original Concept of the Social Market Economy

It is no easy task to answer the question for what the notion of the social market economy explicitly stands for. In a strict sense, the notion refers to the economic concept which has formed the basis of the West German economic policy since 1948 when the currency reform in the three Western zones took place. In a broad sense, the notion defines the economic and social policy of Germany in respect of form and content.[5] Seen in historical terms, the social market economy was not created on the basis of a single plan but it evolved according to different actors with different ideological world views. The social market economy can be particularly associated with three names: Alfred Müller-Armack, Walter Eucken and Ludwig Erhard. They all have contributed to the establishment of an economic order for Germany in the aftermath of the World War II although in different ways. The concept and the notion of the social market economy itself can be traced back to Alfred Müller-Armack[6]. He considered it as a "third way" between laissez-faire liberalism and planned economy[7]. However, the concept of the social market economy was inspired by the work of the adherents of the so called Freiburg School and the concept of "Ordoliberalism". It was above all Walter Eucken[8] who paved the way for the social market economy by laying down the theoretical foundation of the economic concept of Ordoliberalism as an integral part of the social market economy The practical implementation of the social market economy was mainly directed by Ludwig Erhard[9]. He is generally hailed by the public as the father of the Social Market Economy. Thus, the original concept of the social market economy is composed of two different but complementing approaches: The concept of ordoliberalism and Alfred Müller-Armacks concept of a social market economy. Altough both approaches emphasize the importance of free markets and the need for a competition

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5 Quaas in: Social Market Economy : An introduction – History, Principles and Implementation – From A to Z, 2008, 393.

6 Alfred Müller-Armack, „Wirtschaftslenkung und Marktwirtschaft" (1946) reprinted in: Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur europäischen Integration(1966).

7 Müller Armack 1948: 177.

8 Walter Eucken- „Die Grundlagen der Nationalökonomie"(1940), „Die Grundsätze der Wirtschaftspolitik"(1952).

9 Ludwig Erhard was Minister of Economic Affairs from 1949 to 1963 and Federal Chancellor of West-Germany between 1963 and 1966. He is author of the book „Wohlstand für alle"(*Prosperity for all*) (1957).

policy there are fundamental differences between them as will be elaborated in the following.

I. Ordoliberalism

The intellectual foundations of the social market economy were laid down by the adherents of the so called ordoliberal Freiburg School[10]. Ordoliberalism provided Germany after the Second World War an overall framework within which politics in the market economy could be formulated and implemented.[11] The scholars of the Freiburg School, above all the economic scholar Walter Eucken and the legal scholars Franz Böhm and Hans Großmann-Doerth focused upon the intersection between the economic and legal orders. They advocated a new liberal economic order based on classical liberalism and neo classical theory, in particular as a response to the failures of Paleoliberalism[12]. This concept is different from laissez faire liberalism[13] to the extent that it considers regulative interventions as legitimate provided it is aimed to guarantee the functioning of the market. On the other side it differs from Keynesianism as it aims to minimize the influence of the state in economic life.

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[10] It should be noted that the term Freiburg School needs clarification. It must be distinguished between the Freiburg School in a narrow sense and in a broader sense. The former one refers to research and teaching community with Walter Eucken(1891-1950), Franz Böhm(1895-1977) and Hans Großmann-Doerth(1894-1944) at the University of Freiburg in the 1930s and 1940s. The latter one includes Alexander Rüstow(1885-19963) and Willhelm Röpke(1899-1966), who are seen as representitives of the School of Sociological Neoliberalism. The group around Walter Eucken focused upon the intersection between the legal and economic realms whereas Rüstow and Röpke incorporated stronger sociological, historical issues into their writings. In contrast to Eucken and Böhm, Rüstow and Röpke also favoured a more far reaching state intervention in the economy, see: Franz Böhm, Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung(1937); Alexander Rüstow, Freie Wirtschaft- Starker Staat (Die staatspolitischen Voraussetzungen des wirtschaftspolitischen Liberalismus(1932); Willhelm Röpke, Die Lehre von der Wirtschaft81937), Die Gesellschaftskrisis der Gegenwart(1944).

[11] Gerber 1995, p.40.

[12] Alexander Rüstow introduced the term "Palöliberalism(old liberalism) which can be described as a consistent form of liberalism with minimum state interference and without a social element, as it seemed desirable in the 19th century, (Alexander Rüstow,"Paläoliberalismus, Kollektivismus und Neoliberalismus in der Wirtschafts und Sozialordnung(1960).

[13] The term "laissez-faire, laissez passer, le monde va de lui meme" was first used by the Frenchman, Marquis d´Argenson in 1751. He stated, to govern better one must govern less, Berend, 2006, 13. Laissez faire liberalism demands for as little state intervention in the economy as possible. It is assumed that the decisions of the individual agents generate the best solutions, coordinated by the market.

1. Main Concern of the Freiburg School- The Prevention of Power

The ordoliberal approach has to be seen as a response to the socio-economic conditions of the 1920s and 1930s[14]. Ordoliberals were driven by the dramatic events of Germany´s political and economic history, namely a highly cartelized and regulated German economy as the state was captured by vested rent-seeking interest groups during the Weimar Republic, the confrontation with practices of state intervention which resulted in the development of a planned economy in the Soviet Union and the destruction of civil liberties and the rule of law during the Nazi regime[15]. All of these events had one common thread for the individual liberty[16], the concentration of power. Eucken criticized the existing market order in the laissez- faire[17] system as it was according to him solely based on the establishment of a legal order that guaranteed the autonomy of individual action vis a vis others and the state[18], but did not contain any kind of rules to direct the economic process. He argued that due to the absence of mechanisms to prevent and control economic concentrations like monopolies and oligopolies, laissez faire contributed in the decline of a performance based competition system.

Eucken dealt also with the functioning of the command economy. With the emergence of alternative economic systems in the years after World War I national states changed their economic policy radically. This policy depicted the exact opposite of the laissez faire regime. Governments favoured interventionist and protectionist economic policies as a response to the

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[14] see for this Berend 2006, 17.

[15] Wohlgemuth, Western Europe: German unification, integration, globalization- the German social market economy facing a threefold challenge 2006: 150.

[16] According to Eucken, individual liberty consists of the Kantian notion of autonomy, self-legislation and self-determination. Each person is an end in itself and no instrumental mean to an end. But the exertion of freedom is not unlimited. The exercise of one´s freedom is limited by the freedom of others. Freedom has to be protected by the law giving bodies of the state, pointing at the interrelatedness of freedom and the rule of law. The jurisdiction and a clear cut definition of the state´s tasks is responsible for averting the threefold dangers threatening liberty: private power of producers, semi-public and corporatist powers of societal collectives and the powers of the state, Klump/Wörsdörfer, Ordoliberal Interpretation of Adam Smith 2010, 40.

[17] The term "laissez-faire, laissez passer, le monde va de lui meme" was first used by the Frenchman, Marquis d´Argenson in 1751. He stated, to govern better one must govern less. Laissez faire liberalism demands for as little state intervention in the economy as possible. It is assumed that the decisions of the individual agents generate the best solutions, coordinated by the market, Berend, 2006, 13.

[18] Sally, Classical Liberalism and International Economic Order 1998, 109.

failure of laissez faire capitalism[19]. This was also the time when central planning was introduced in the Soviet Union. Features of the command economy are amongst others the absence of economic freedoms such as the freedom of trade, movement, association and contract. Private property no longer conferred the right to plan and act autonomously. Eucken argued that the individual freedom under the rule of law was incompatible with the central direction of the economic process. The latter destroyed fundamental economic freedoms in the sense that individuals no longer had the equal protection of the laws with regard to the use and disposal of their property.
These historical considerations indicate the fundamental problem in the view of Eucken, namely, that of power. The rise of private power resulted in a degeneration of the market and legal orders and influenced also the political life in Germany. This prepared the ground for experimental economic policy, resulting in the rise of state power and the collusion of public and private power in cartel-like, corporatist arrangements. Governmental intervention in the economy necessarily reduced the effectiveness of the market economy.

The adherents of ordoliberalism saw the way out of this dilemma in embedding the market in a constitutional framework. They argued that this would protect the process of competition from distortion and minimize governmental interference in economic life. The core of this idea was the establishment of an economic constitution[20]. " Gerber states that the main idea of the Freiburg School behind the establishment of an economic constitution was "that a community should make decisions about the kind of economy it wants in the same way that it makes decisions about the political system it wants. These decisions represent fundamental choices, and, once made, the legal system should be required to implements them"[21].This economic constitution had to consist of a competitive order (Wettbewerbsordnung) constituted and regulated by the institutional order policy (Ordnungspolitik) of the state, compatible with the state under the rule of law (Rechtsstaat). In this concept the it is the task of the state to enable free and fair competition by providing the appropriate economic order.

[19] Berend 2006, 60.
[20] David J. Gerber, Constitutionalizing the Economy : German Neo-Liberalism, Competition Law and the "New Europe", 42 American Journal of Comparative Law L. 25(1994); David J. Gerber, Competition Law and International Trade: The European Union and the Neo-Liberal Factor Pacific Rim Law& Policy Journal 1995, Vol.4. No.1, 37-57.
[21] Gerber 1995, 42.

Moreover, competition is not seen as an end in itself, but a means to reach the overall aim of a functioning and humane socioeconomic order. In Euckens point of view the state's task must be limited to institutional order policy (*Ordnungspolitik*) instead of process policy (*Prozesspolitik)*[22] "The state should influence the design of an economic framework, but not itself direct economic processes […] State planning of forms-Yes! State planning and control of the economic process-No!"[23] . The state as an ordering and regulating power has the responsibility for consciously and consistently designing and shaping the "rules of the game" and for implementing a judicial-institutional framework[24] . State interventions into economic processes which did not conform to the price mechanism and the automatism of the market derived from it, should be avoided.

2. The Ordoliberal Economic Order[25]

Eucken elaborated a model with ideal conditions for a resilient competitive order to safeguard the task of the state to set the regulative framework for the economy. These economic control variables comprised the so called constitutive principles, the regulative principles and the interdependency of orders[26].

[22] To clarify, the term economic policy refers to all government activities implemented and administered in order to influence and control the economy in line with political objectives. There are two kinds of economic policies to be distinguished: institutional order policy and process policy. Institutional order policy refers to a kind of economic policy which constitutes the content of an economic system. It aims at achieving the desired economic order. To this extent, an institutional framework is implemented to coordinate the activities of the market participants in such a way that an economically integrated process results which will produce advantageous outcomes for the society as a whole. The main actor in the institutional order policy is the legislative power. Process policy contains measures which are used to intervene in the actual economic process. The main actor in process policy is the executive(states, authorities, central banks, monopoly commissions). Areas where process policy actions might be implemented are goods or factor markets, specific industries or the entire economy(price levels, employment, income policy). Eucken rejected the latter. Governmental interventions in the market process were in his point of view not necessary and even more, they were not legitimate; Hans Jörg Thieme, Institutional order policy and process policy in: Social Market Economy, History, Principles and Implementation- From A to Z, 2008, 270.

[23] Walter Eucken, 1951,95; Nils Goldschmidt 2012, 2.

[24] Klump/Wörsdörfer 2010, 41.

[25] see for this, Eucken, A Policy for Establishing a System of Free Enterprise, 1952, 115; Zinn, 1992,29; John 2007, 5.

[26] Eucken, 1955, 254.

2.1. Constitutive Principles[27]

The constitutive principles form the cornerstones of Eucken's model and are designed to establish the competitive order. Eucken defined the constitutional principles as follows: " By constitutive principles, we mean those principles making up a country´s economic constitution whose joint application at a specific point in history establishes a certain envisaged economic system. This is done by creating conditions which serve to bring that system into being. Hence, all the principles in question help to promote the adoption of an overall economic decision and also represent the instruments used in practice to enforce that overall decision"[28]. The constitutive principles are composed of the following:

Workable Price System with Perfect Competition

The most important principle is the establishment of a market structure with a sound pricing system, which has to reflect relative scarcity combined with a high degree of competitive pressure. The competitive pressure increases with the number of suppliers and buyers who are active in the market. This makes a general ban on cartels and monopolies the necessary consequence[29].

Primacy of Monetary Policy

The primacy of monetary policy aims at stabilizing the value of money as a necessary condition for a functionally competitive economy. Eucken states that all efforts to translate a system for regulating competition into reality are fruitless until a certain degree of stability in the value of the money has been ensured. He blames the "faulty design of the monetary system" for the emergence of inflation and deflation in the recent German history.

Private Property of Means of Production

The existence of private property rights gives incentives to work, enables entrepreneurs to innovate, creates new jobs and initiates economic growth and welfare. As is well known among economists private property means

[27] Walter Eucken, 1990, 254.
[28] Eucken, A Policy for Establishing a System of Free Enterprise 1952, 130.
[29] Gerken, 2008, 38.

freedom and power of entrepreneurial disposition as well as the incapacity to limit freedom and power of disposition of all others in the society. Only Individuals rights and freedoms which derive from the private property of means of production allow the flexibility of entrepreneurial decisions.

Free Access to Markets

The freedom of access to markets includes both the freedom of entry and the freedom of exit. The freedom of market entry involves the removal of public and private economic barriers. Only in the absence of restrictions to the market entry prices can discern their signally function and the safeguarding of competition can be guaranteed.

Freedom of Contract

The free choice of the contractual partner is an essential complement to the principle of the private ownership. The review of market decisions depends on the possibility of changing the contractual partner or the content of the contract. Associated therewith market power can be reduced and competition can be promoted more easily. But not all kind of contracts are allowed. Especially contracts limiting the degree of competition, excluding agents, and promoting cartels, oligopolies and monopolies are prohibited

Complete Liability of Property Owners

Eucken stated that those who benefit from something must also be prepared to bear a loss if need be[30]. The criterion of unlimited liability therefore aims to ensure that market participants have to take the responsibility for their mismanagement in the crisis. A dissipation of capital when doing business and associated with that, the "moral hazard" phenomenon should be avoided.

Steadiness of Economic Policy

In order to avoid uncertainty, the economic policy of the state should be predictable and steady and be oriented on political objectives. Companies

[30]Eucken, A Policy for Establishing a System of Free Enterprise, 1952,122.

should be enabled to plan their business on a long term basis and to organize it reliably. Investment decisions are calculated in the long term.

2.2. Regulative Principles

The constitutive principles are supplemented by the so called regulative principles. In Eucken´s opinion the constituting principles were not adequate to ensure the creation of an undistorted competition order. He was aware that despite the existence of a competition order individual hardship and loopholes could evolve. The compliance of the regulating principles as part of the economic policy of the state should therefore modify and adjust inefficient market outcomes, i.e. in the case of market failures, so that the functioning of the competitive order could be permanently maintained. The regulative principles are composed of the following:

Reduction and Control of Monopoly Power

The main task of the state is to combat the creation of monopolies. The control over cartels and monopolies should be carried out by the state[31]. If monopolies already exist they should either be destructed or their market behavior should be regulated, if destruction is not possible.

Income Policy

Eucken stated that a redistributive income policy was ethically imperative. Explaining this stand he argued that the market process caused an unequal distribution of income[32]. Accordingly, it was the task of the state to correct the unequal distribution of income through its fiscal policy. As regards this subject, he recommended the introduction of a progressive income tax system. By saying this, he was aware about possible negative side effects of income redistribution. He therefore pleaded that a decline of investment and economic efficiency had to be avoided.

Correction of Externalities

The correction of negative externalities is related to costs that are not associated with the economic activity of market participants. Eucken

[31] Eucken, 1955, 294.
[32] Eucken, 1955, 300.

discussed these externalities mainly in ecological terms, having in mind costs which were caused by environmental destructions.

Regulation in the Case of Non-Normal Reactions of Supply

Euckens forth regulative principle concerned non normal reactions of supply on the market. As regards this, he referred explicitly to the labour market where in his point of view imbalances between supply and demand could appear. Here, it was the task of the state to take corrective measures. These shall include amongst others regulations of the working conditions, in particular occupational health and safety, protection of children and women but also trade unions and the implementation of minimum wages. Eucken further carried out, that it was a necessary task of the government to actively engage in the labour market during situations of drastic structural unemployment, for example by subsidizing minimum wages, such that lower labour costs encouraged additional hiring.

2.3. Interdependency of Orders

The constituting and regulating principles are in the view of Eucken mutually complementary[33]. He pleaded for integrating them in a unified approach. Economic, social, legal and other policies as sub-orders of the society needed to be compatible so that the institutions mutually support each other. By taking only selective measures without putting the constituting and regulating principles altogether into practice would not bring about the desired result. Eucken emphasizes in this regard the importance of thinking in terms of order, meaning that all acts of policy should be judged in terms of how they fit in with the total economic process and its steering mechanism. This is particularly important given the complex interdependence brought about by an extensive division of labour in the modern economy. In such a complicated apparatus, the process of coordination of economic activities, that is, the "steering mechanism" of the economy, is highly sensitive to particular measures in any one area of policy. Thus, "all economic policy questions get back to the question of economic order and have sense only in this context. This is the core of Eucken´s concept of the interdependence of

[33] Eucken 1955, 304.

policy within an economic order, which he extended to a political -economic interdependence of orders: the mutual interdependence of the economic order with the other orders of the society.

3. Ordoliberalism and the Formation of Social Policy

Social Policy in the ordoliberal concept takes only place in the realm of the institutional order policy. Accordingly, Eucken wished to realize social policy aims only by shaping and developing an acceptable economic system, thus bringing about an increase and a more equitable distribution of income and wealth, in particular through the effectiveness of competition. Moreover, according to Eucken an important principle for shaping the social life has to be seen in the principle of subsidiarity. This principle which originates from the Catholic social teaching prescribes that public tasks should always be executed at the lowest level in the hierarchy of authorities. Only if that level is not up to the task it can be transferred to the next level. This principle should also be applied in the citizen/state relationship. This means that as many as possible decisions should be left to the citizens themselves. It is therefore first down to self-initiative, self help and the personal responsibility of an individual and the community before the state intervenes. The state should only assist those citizens who were not able to help themselves. Only then should the social security system as a last resort intervene.

4. Ordoliberalism as "Authoritarian Liberalism"[34]

Ordoliberals criticized parliamentarism, democracy and pluralism[35]. In their point of view the parliamentary decision making process is subject to the influence of socio- political rent seeking and power groups. The development of norms should therefore take place in an anti- pluralistic way, namely without the approval of legitimate interest groups and without the citizens involvement and participation in a democratic decision making process(non consensus seeking approach).They were worried about democracy regarding the influence of masses in combination with the impact of interest groups and pleaded as a matter of fact for a prevention of mass influence. In their point

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[34] See for this, Dieter Haselbach, 1991 , Ptak, Ralf, Vom Ordoliberalismus zur Sozialen Marktwirtschaft. Stationen des Neoliberalismus in Deutschland, 2004, 43;
[35] Manuel Woersdoerfer 2010, Ordoliberalism and the evolution of norms:14

of view the mass population had to be led by educated elitist experts[36]. Elite in the ordoliberal point of view has nothing to do with exclusive privileges and prerogatives in the realm of aristocracy, bourgeoisie or oligarchy, but rather with education. They call it Leistungs-and Wertelite(elite based on merits and individual qualifications. But it should be noted, that ordoliberals supported without any doubt the rule of law[37]. They evidently opposed unlimited government and the rent-seeking society and they sought to implement institutional precautions in order to prevent a turning back into a state of re-feudalisation and collusion of private and public power in cartel-like corporatist arrangements in which the state authorities are captured by vested interests. Eucken favoured that institutional order policy is guarded by independent experts which do not have to fear to be ousted from power for taking unpopular decisions.

II. Alfred Müler-Armack´s Social Market Economy

Ordoliberalism was substantially supplemented with sociological and political elements after the Second World War by the Cologne School of Economics around the economist Alfred Müller-Armack. In the concept of Alfred Müller-Armack the state is given a more comprehensive role than in the concept of the Freiburg School. Müller Armacks work on Economic Control and Market Economy, published in 1946, reflects his core concept of the social market economy[38]. In the preface of his book Wirtschaftsordnung *und Wirschaftspolitik* he outlined the origin of his idea of a market economy designed in a way that was socially sensible[39]:"Already during the last years of the war, I gratefully picked up thoughts by Walter Eucken and his circle that aimed at a renewal of competition. The strong emphasis on the competitive order as the means to design economic policy I sure enough always felt to be too narrow. Thus, I additionally called for a system of social and socio-political, yet market conform measures"[40]. Müller-Armack considered contrary to Eucken and Böhm the idea of social balance as a potentially conflicting relationship that needed to be reconciled by ways of “a

[36] Wörsdörfer, 2010, 14; Röpke 1944/1949, 210.
[37] Wörsdörfer, 2010, 9.
[38] Quaas 2008, 52.
[39] Goldschmidt/Wohlgemuth in:Social Market Economy: origins, meanings and interpretations: 270.
[40] Müller Armack, 1965/1976, 10, Translation: Nils Goldschmidt 2012, 4.

regulative policy which aimed to combine on the basis of a competitive economy free initiative and social progress"[41]. The social market economy should go beyond liberalism and central planning in terms of a third way. Contrary to types of guided market economics, the social market economy should become a socially managed market economy which was oriented towards the unparalleled dominance of the market mechanism with its flexible price system beyond any planning illusion. Therefore planning mechanisms were rejected for the objective of social cohesion and balance was to be achieved under the primacy of market related instruments. However, according to Müller-Armack the market economic model had to focus on the acknowledgement of market failures, the possible incongruence of market process and social justice and the necessity of embedding the competitive order in an institutional framework that provided most promisingly for integrative as well as reconciliatory moments and established common norms and values.[42]. Thus, Müller-Armack saw his social market economy as the "dissolution of libertarian and socialist antagonisms through the ideas of balance, equilibrium and compensation"[43].

1.Social Market Economy as Social Irenics

The whole conception of the social market economy is based on Alfred Müller-Armacks idea of social irenics[44]. Müller-Armack dealt with the question how diverging religious and philosophical ideologies could be reconciled and transformed into unity in order to establish a broad acceptance in favour of a free and fair market economy. To achieve this aim, he developed the concept of social irenics.[45] Social irenics proposes in which way one should cope with the inevitable co-existence of differing world-views[46]. Müller-Armack conceptualized social irenics against the background of the intellectual situation of post war Germany. He took into consideration four philosophical positions, namely Catholicism, Protestantism, Marxist Socialism and Laissez-

[41] Müller Armack, 1989, 83.
[42] Alexander Ebner 2006, 212.
[43] Goldscmidt, 2012, 20.
[44] Müller Armack in: Soziale Irenik, 1950, 563.
[45]The term is derived from the Greek word eirene(peace) and from the name of the Greek goddess of peace Eirene, daughter of Zeus, Quaas, Social Market Economy:Social irenics 2008, 416.
[46] Quaas, 2008:417.

faire Liberalism. He took into consideration the "Westphalian Peace, too, and hoped that the post World War II era would become very much like the second half of the 17th century[47]. This period of time can be characterized as an era or reconciliation, confidence and harmony between contradicting worldviews. Hence, Müller- Armack´s aim was to adopt this thought to the opposing world views of the 19th century, socialism and liberalism. These ideological groups were in his view confronted with the task of overcoming their intellectual isolation by integrating the perspectives of others into their own thinking. He pleaded for the co-existence of these philosophical positions, having the idea in mind that none of them should become absolute dominant over the others. To combine the efficiency of a free market with social balancing in such a way that politically and economically both aspects receive sufficient attention, it required the ability to look at issues from different angles and to weigh up the existing options against each other[48]. Müller- Armack did exactly this when he created the concept of the social market economy. To this end, Müller – Armack´s concept in itself is an example of a social irenic approach.

From this it can also be inferred that for Müller-Armack the concept of the Social Market Economy was open and accordingly constituted a certain economic and social style rather than a closed theory like the concept of Ordoliberalism[49]. With an open system he aimed at making it possible to undertake necessary adjustments to changing socioeconomic conditions in society. The dynamics of the economic style of the social market economy made in his point of view openness to social change a necessity[50]. Conceptual adjustments and variations should be introduced in such a manner that the basic idea of the concept was not harmed and did not lose its meaning. Müller-Armack expressed this basic idea of the concept of the social market economy in an abstract and generalized abbreviated formula[51].

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[47] Müller-Armack 1950, 559, in: Soziale Irenik : Über die Möglichkeit einer die Weltanschauungen verbinden Sozialidee.
[48] Quaas 2008 , 417.
[49] Quaas 2008, 394.
[50] Glossner:2010, 48.
[51] „Our concept is abstract, it can only gain acceptance if it sets a concrete meaning and demonstrates the man in the street that it will redound to its advantage" Alfred Müller Armack at the 1953 annual meeting of the Mont Pelerin Society(quoted from Ptak 2009).

During political transformation, the content of this formula should be translated into practice under consideration of the prevailing social condition.

2. **Social Elements in the Social Market Economy**

Müller-Armacks concept differed fundamentally from Ordoliberalism as it was in many respects incompatible with key features of the ordoliberal economic order. Müller- Armack agreed with the concept of the Freiburg School to the extent that the task of the state was to establish a functioning competitive order within an institutional framework based on institutional order policy. But he disagreed with the Freiburg School in regard of the government's role in the realm of economic and social policy . Eucken argued that both economic and social objectives had to be reached via Ordnungspolitik. In contrast, Müller-Armack pleaded for a regulative state policy to shape the social sphere. From this it can be inferred that in Müller-Armack´s concept the social and economic policy of the state are put on a par, meaning that social matters are seen as equivalent principles with economic matters[52] and are not subordinated to the institutional order policy.

It is important to note that the idea of freedom in the concept of the social market economy is not granted unlimited. The market economic component within the social market economy cannot be compared with the laissez faire liberalism of the 19th century, where an unlimited enforcement of individual interests took place. The idea of freedom as such includes amongst others the right to freedom of personal development. This right however has to be limited to a certain degree when the life of other members of the society is concerned. The social component of the Social Market Economy constitutes restrictions of the economic freedom where the action of economic agents are incompatible with the values of the society or where human dignity is violated. Müller-Armack aims in this regard to combine the principle of a free market with that of social balancing. Müller -Armack mentions four aspects that aim at the social correction of market results[53].

[52] Glossner, 2010, 43.
[53] Müller-Armack 1978, 326.

2.1. The Social Effects of an Undistorted Market Economic Order[54]

Müller-Armack took the view that a market economic order which was structured and maintained according to the principles of ordoliberalism was basically social in itself [55]. In comparison with socialism, such a market economy was in the first instance more able to satisfy the needs and interests of consumers. Furthermore, the permanent growth of productivity as a result of undistorted economic competition provided for goods with high quality and let to higher incomes. Both must be understood as social achievements of markets.

2.2. **The Adjustment of Social Imbalances**[56]

The requirement of adjustment of social imbalances refers to situations where the market is incapable to master social tensions and problems. Müller-Armack saw the principles of "freedom" and "adjustment" of social imbalances in a complex relationship. The market process could at best provide for a fair distribution of income which reflected the efforts undertaken in the market. But this distribution did not take care of incapacitated or partially incapacitated individuals like children, the aged, the sick, the disabled and the unemployed that cannot participate in the market[57]. Müller-Armack considered it for these reasons as a necessary task of the state to shape the market economy on the basis of redistributive social policies in social terms and to establish a comprehensive social security system, including amongst others pension-, health and unemployment schemes, albeit he conceded the tension to the incentives for the willingness to perform[58].

2.3. **Business Cycle Policy**[59]

Contrary to Eucken who rejected policies which aimed at preventing economic fluctuations, Müller-Armack regarded business cycle policy as an

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[54] Müller Armack, Wirtschaftsordnung und Wirtschaftspolitik 1966, 131; Joerges 2004, 15.
[55] Müller Armack, Wirtschaftsordnung und Wirtschaftspolitik 1966, 131.
[56] See for this, John 2007, 8; Joerges, Social Market Economy as Europe´s Social Model? 2004, 15.
[57] Lampert, 2008, 420.
[58] Müller Armack in „Soziale Marktwirtschaft" Handwörterbuch der Sozialwissenschaften Bd. IX 1956, 391.
[59] see for this John, 2007, 8.

important style of his concept to diminish fluctuations in economic activities, which are inherent in industrial societies[60]. He furthermore favoured full employment programs and did not reject the extension of state demand as an approximate instrument. He advocated a sound structural policy in cases where long term difficulties in structural adaptation would arise and branches of industry or certain regions of the country would get into difficulties.

2.4. Limits of Governmental Intervention[61]

Governmental Interventions in the market process are limited mainly by the principle of market conformity and the principle of subsidiarity To avoid a possible contradiction between economic and social policy, Müller-Armack elaborated the criteria of the *market*-conform measures. As regards this, Müler-Armack utilized Wilhelm Röpkes idea of market conformity according to which government interference into the economic mechanism must not render the market processes less effective [62].

3. Interim Conclusion

It was shown, that the original concept of the Social Market Economy is made up of two different but complementary approaches. Both emphasize the role of open and free markets, the importance of a stable value of the money and the need for competition policy. In addition, both strands acknowledge the need for a policy to adjust social imbalances. But there are fundamental differences between the adherents of the Freiburg School and the Alfred Müller-Armack as to what degree the government should intervene in the economic process. Whereas ordoliberalism focuses solely on institutional order policy ,the social market economy according to Alfred Müller-Armack is based on both, institutional order policy and process policy. Both approaches underline the importance of market conformity and subsidiarity. Notwithstanding the disparities in regard of the degree of governmental interventions in the market process, Alfred Müller-Armack accomplished to incorporate the ordoliberal ideas in the original concept of the social market economy

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[60] John 2007, 7.
[61] John 2007, 8.
[62] Social Market Economy-History, Principles and Implementation - From A-z, Glossary 2008, 487.

C. The Social Market Economy and the Economic Constitution of the Basic Law

After having analyzed the original concept of the social market economy, it will be dealt with the question, in how far the original concept of the social market economy is reflected in the economic constitution of the German Basic Law. In particular, it will be analyzed whether the main idea of the social market economy, namely the combination of the freedom on the market with social justice by taking market conform measures has been constitutionalized. This question is insofar of importance as it makes clear in how far the original concept of the social market economy is justiciable according to the Basic Law. Moreover, it gains even more significance when taking into account that the provisions of the Basic Law occupy the highest position in the hierarchy of norms within the German legal system, thus making it obligatory for the state and citizens to comply with them.

1. Academic Debate on the Economic Constitution of the Basic Law

When taking a look at the Basic Law which was signed on 23 May 1949 one will vainly search the notion social market economy or any other expression referring to a particular economic system. Unlike the Weimar Constitution the Basic Law does not contain a section explicitly dealing with an economic constitution[63]. The founding fathers of the Basic Law deliberately refrained from making reference to a specific economic system. This has to do with the fact that a legal hindrance for the reconstruction of Germany after World War II wanted to be avoided[64]. In addition, the Basic Law was rather seen as a provisional constitution, meaning that against the background of a divided nation it should remain in place only until Germany's reunification. This provisional intention is especially reflected in the preamble of the Basic Law where instead of "Constitution" the notion "Basic Law" was chosen. Given to this fact, shortly after the adoption of the Basic Law a discussion among academic scholars about the issue of the economic constitution of the Basic

[63] The Weimar Constitution contained in Articles 151-166 an explicit section on the economic order

[64] Ulrich Karpen, 1990, 40; Ernst Benda, 1981, 6.

Law evolved. The absence of a clear determination in favour of a specific economic system and the normative uncertainty of the Sozialstaatsprinzip(social state principle) resulted in the emergence of intensive academic discussions among German constitutional scholars in the early 1950s. There was in particular no consensus whether and if so which economic constitution could be derived from the Basic Law. Ernst Rudolf Huber[65] was of the opinion that the provisions of the Basic Law offered room for the realization of a mixed economic constitution, bringing together elements of liberal and social rights in a balancing order. According to this view the Basic Law precluded both, a laissez faire market economy and a command economy. He furthermore argued that the concept of the social market economy complied with the provisions of the Basic Law and constituted a possible economic order for Germany, but not the only possible one. In contrast, Carl Nipperdey[66] argued that the social market economy was the economic constitution of the Basic Law. Although the Basic Law did not contain a special section on the economic life, it incorporated according to him economic, constitutional and legal principles which corresponded only to the system of the social market economy. Nipperdey based his view on Article 2 I GG, which refers to the general principle of freedom and as such covers amongst others the freedom of enterprise, -competition,- contract, -production, -consumption and price formation. Furthermore, he referred to the freedom of association, Article 9 I GG, the freedom of occupation, Article 12 I GG and the guarantee of private property, Article 14 I GG. These economic guarantees had to be socially balanced by the social state principle. According to this view, other economic orders than the social market economy were not allowed. Krüger[67] on the other hand argued, that the Basic Law was from an economic point of view neutral. He traced his assumption back on the non-existence of an explicit decision in favour of a particular economic system in the Basic Law.

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[65] E. R. Huber, 1953, 18.
[66] Carl Nipperdey, 1961, 27.
[67] See Krüger, 1951, 361.

2. The Neutrality of the Basic Law

The BVerfG provided clarity to the then ongoing discussion by handing down a judgment in the landmark Investment Aid I case, which dates back to 1954. The Court made unambiguously clear, that the concept of the social market economy did not constitute the economic constitution of the Basic Law. The factual situation underlying the judgement in the Investment Aid case[68]was the following:

After World War II the iron and coal industries lacked the necessary capital to finance their reconstruction. On the recommendation of the common market, the federal parliament enacted the Investment Aid Act in 1952(as amended in 1953) for the purpose of creating an investment fund for the benefit of these industries. The fund was created by compulsory contributions from the profits of other manufacturers and traders. Several corporations lodged a constitutional complaint claiming that the legislation imposing a special tax on them were unconstitutional. Complainants alleged among other things a violation of their constitutional guarantee of free development of personality, Article 2 I GG, due to the restriction of free business activities. Furthermore, it was claimed that the Investment Aid Act did neither comply with the neutrality of the Basic law nor was it in line with principles of a market economy since it was not a market conform.

The BVerfG considered the constitutional complaints as unfounded and referred especially to the Basic Law's image of man and the neutrality of the economy[69]. In regard of the former it stated that:

> "The picture of the human being in the Basic Law is not that of an isolated sovereign individual; the Basic Law has resolved the tension of the individual with society much more in the sense of relations to society and ties of a person to society, without at the same time infringing his own worth. That follows in particular from looking at Art. 1, 2, 12, 14, 15, 19 and 20 of the GG together. But this means: the individual must put up with those limitations on his freedom of action which the legislator draws for the care and advancement of communal

[68]Investment Aid Case, 4 BVerfGE 7, (1954), partially translation of the case in: Kommers 2012, 655. Gregory S. Alexander, Property as a Fundamental Constitutional Right? The German Example, in: Cornell Law Faculty Working Papers 3-1-2003.
[69] See Krüger, 1951, 361 .

social life within the boundaries of what is generally reasonable in the given circumstances, provided that the independence of the person is preserved at the same time. The Investment Aid Act keeps within this framework"[70].

In regard of the neutrality of the economy[71] the Court stated that:

"The basic law guarantees neither political-economic neutrality of the executive and legislative powers nor a‘ social market economy’ to be controlled only by measures in conformity with the market. The ‘political-economic neutrality’ of the basic law consists only in the fact that the draftsman of the constitution did not decide expressly in favour of a particular economic system. This enables the legislator to follow the economic policy which seems to him at any time to be proper, as long as he observes the basic law at the same time. The present economic and social order is certainly a possible order under the basic law, but definitely not the only possible one. It is based on an economic and socio-political decision produced by the will of the legislator. This decision can be replaced or annulled by another decision. Therefore it is of no importance from a constitutional law point of view whether the investment aid act is in harmony with the present economic and social order and whether the method used for economic direction is in ‘conformity with the market"[72].

In the Codetermination case[73] which will be analyzed in detail later, the BVerfG confirmed the doctrine of neutrality. The Court stated that the discretion of the legislator to shape the economy was bound by the Basic Law which did not incorporate any particular economic framework of organization prior to or independent of guaranteed individual rights. The legislator was allowed to pursue any economic policy as long as particular fundamental rights of the Basic Law are not violated. It stated that:

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[70] BVerfGE 4, 7, Translation: Raymond Youngs, Sourcebook on German law, 1993, 207.

[71] BVerfGE 4,7 (17) (...) „ Das Grundgesetz garantiert weder die wirtschaftspolitsche Neutralität der Regierungs-und Gesetzgebungsgewalt noch eine nur mit marktkonformen Mitteln zu steuernde soziale Marktwirtschaft. Die wirtschaftspolitsche Neutralität des Grundgesetzes besteht lediglich darin, daß sich der Verfassungsgeber nicht ausdrücklich für ein bestimmtes Wirtschaftssystem entschieden hat. Dies ermöglicht dem Gesetzgeber, die ihm jeweils sachgemäß erscheinende Wirtschaftspolitk zu verfolgen, sofern er dabei das Grundgesetz beachtet.“

[72] BVerfGE 4,7 (17), Translation: Raymond Youngs, Sourcebook on German law 1993, 209.

[73] Codeterminiation, BVerfGE 50, 290.

> "It accords with this when the BVerfG has ruled that the GG is neutral with regard to economic policy; the legislator may pursue any economic policy which appears pertinent to him, in so far as, in doing so, he takes account of the GG, and in particular of fundamental rights. He therefore possesses a far-reaching freedom of formation. The element of relative openness of the constitutional order which comes to light therein is necessary in order to take account of the historical change which characterizes economic life to a particular extent and, on the other hand, not to put the regulatory power of the constitution at risk. Of course, the taking account of the legislator's freedom of formation must not lead to any curtailment of what the constitution intends to guarantee unaltered through all change, especially not to any curtailment of the individual freedoms guaranteed in the individual fundamental rights, without which, according to the conception of the GG, a life in human dignity is not possible. The task consequently consists in reconciling the essential freedom of formation in economic and social policy, which must remain accorded to the legislator, with the protection of freedom to which the individual citizen precisely also vis-à-vis the legislator has a constitutional right".[74]

From these judgments it can be clearly inferred that the concept of social market economy does not constitute the economic constitution of the Basic Law. This is even more so, given the fact that the Court unambiguously made clear that the market conformity which is a major element of the concept of social market economy is not a criterion for assessing the constitutionality of legislative action. In addition, the BVerfG decided against the ideal typical - ordoliberal understanding of the economic constitution and did instead interpret the economic constitution in the constitutional law sense. According to the latter, the economic constitution refers to "the sum of legal constitutional structural elements of the system of economy[75]. It must be borne in mind which consequences it would have had if the BVerfG accepted the social market economy as the economic constitution of the Basic Law in

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[74] European Economic Case Law 1979, 108 , BVerfGE 50, 290 ,141.

[75] " Die Wirtschaftsverfassung ist die Summe der verfassungsrechtlichen Gestaltungselemente der Ordnung der Wirtschaft" Schmidt, 1990, 70, in: Hatje 2010, 590.

the ordoliberal sense. It would have meant that every state action had to be assessed on the criterion of market conformity and this in turn would have entailed a restriction of the legislators decision making power to the extent that only market conform measures could have been taken. The Court instead established the doctrine of neutrality of the Basic Law, allowing the legislator to pursue any policy it wants, as long as the values of the Basic Law were respected.

In order to avoid misunderstandings, the neutrality of the Basic Law must be further clarified. In the first instance and as a result of the two rulings of the BVerfG it is right to say that the Basic Law does not contain any explicit systematic decision in favour of an economic system. However, this does not mean that a market economic system cannot be realized. The Court made it clear that the realization of the social market economy or any other economic order as such is a political task depending on the will of the legislator and associated therewith on political majorities. It is therefore important to draw attention to the following particularity: while it is true that the social market economy is not the economic constitution of the Basic Law there is no doubt that the social market economy is constituting the established economic order of Germany. Accordingly, the legislator has decided in favour of the social market economy as the economic order of Germany[76]. In particular, at the end of the parliamentary term in 1957 the legislator adopted the Treaty on the German Federal Bank(Gesetz über die Deutsche Bundesbank) and the Act against Restraints of Competition(Gesetz gegen Wettbewerbsbeschränkungen). Thus, ordoliberal ideas started very early to play a significant role in the economic policy of Germany.

Moreover, the social market economy has been enshrined in a formal law. With the German reunification in 1990 which was finalized by the Treaty between the Federal Republic of Germany and the German Democratic Republic establishing a Monetary, Economic and Social Union [77] the social market economy has gained legal status as Germany's economic system. In Article 1 (3) the social market economy is characterized by the particular

[76] See for this Christian Otto Schlecht, Social Market Economy: Political Implementation,2008, 401.

[77]Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands(Einigungsvertrag), BGBl. 1990 II S. 889.
http://www.gesetze-im-internet.de/einigvtr/BJNR208890990.html.

features “private property, competition, free price formulation and generally total freedom of movement in terms of work, capital and services”. According to Article 1(4) the social order is characterized by a labour market order compatible with the social market economy and a comprehensive system of social security services based on the principles of justice of achievement and social compensation. It can be clearly seen that the description of the basic characteristics of the social market economy in the Treaty of the reunification are based on both, Ordoliberalism and Alfred Müller Armack´s concept of the social market economy with the inclusion of social balancing.

It is furthermore important to note, that the social market economy is enshrined in two *Länder* Constitutions. Article 38 of the constitution of the Freistaat Thüringen (Land Thuringia) states that: "The regulation of economic life must be compatible with the principles of a social and ecological market economy"[78]. Article 51 of the constitution of Rheinland-Pfalz(The Land Rheinland-Palatinate) states the following: "The social market economy is the basis of the economic life. It contributes to the safeguarding and improvement of the living and working conditions by linking economic freedoms with social balancing, social security and the protection of the environment[79].

In addition, against the backdrop of the ongoing European integration process the question of the neutrality of the Basic Law must be viewed in a new light. The decisions to the Investment Aid and Co-Determination cases were handed down to a time when the European integration process was not well advanced and accordingly the influence of Community law on the economic constitutions of the Member States was rather limited. This however has essentially changed. The BVerfG has in several rulings[80] gradually accepted the transfer of sovereign rights to the EU. Furthermore,

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[78] Die Ordnung des Wirtschaftslebens hat den Grundsätzen einer sozialen und der Ökologie verpflichteten Marktwirtschaft zu entsprechen, Artikel 38 der Verfassung des Freistaats Thüringen (Auszug) Vom 25. Oktober 1993 (GVBl. S. 625), zuletzt geändert durch Gesetz vom 11. Oktober 2004 (GVBl. S. 745).

[79] Artikel 51 [Wirtschaftsordnung] Die soziale Marktwirtschaft ist die Grundlage der Wirtschaftsordnung. Sie trägt zur Sicherung und Verbesserung der Lebens- und Beschäftigungsbedingungen der Menschen bei, indem sie wirtschaftliche Freiheiten mit sozialem Ausgleich, sozialer Absicherung und dem Schutz der Umwelt verbindet.

[80] see for this BVerfGE 37, 271- Solange I; BVerfGE 73, 339- Solange II, BVerfG 89, 155- Maastricht; BVErfGE 2- BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 - Lissabon.

Article 23 GG of the Basic Law has been amended in 1992, which allowed a further transfer of power to the European Union. The CJEU on the other hand has declared the primacy and superiority of EU law over the law of the Member States. As a matter of fact, the economic constitution of the Basic law cannot be assessed anymore isolated from the European economic constitution. This development has implications on the German legislator´s leeway of discretion to shape the social market economy. In contrast to the economic constitution of the Basic Law, the European economic constitution cannot be considered as neutral. This has to do with the fact that the European economic constitution is more specific than the constitutional laws of the Member States as regards the constitutional determination of economic structure and process[81]. In contrast to the Basic Law, the (social) market economy has been constitutionalized in Community law. According to Article 3(3) TFEU one of the objectives of the European Union is the creation of a highly competitive social market economy. Furthermore, Article 119(1) TFEU obliges the Member States to conduct their economic policies with a view to contributing to the achievement of the objectives of the Union in accordance with the principle of an open market economy with free competition. Against the background that the European economic constitution cannot be termed neutral and comprises a systematic decision in favour of a market economic system the question arises whether the neutrality of the Basic Law can be still maintained. This question is controversially discussed in Germany. On the one hand it is argued that the decision in favour of a market economic system in the EU Treaty had no influence on the neutrality of the Basic Law[82]. On the other hand it is argued, that European Union law has repealed the neutrality of the economic constitution of the Basic Law[83] which prohibits a change in system to a planned or centrally administered economy[84]. In the absence of further case law of the BVerfG on the neutrality of the Basic Law, it is not necessary to decide this controversy. As a matter of fact, it must be still assumed that the Basic Law is neutral in economic terms.

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[81] Julio Baquero Cruz, Between Competition and Free Movement- The Economic Constitutional Law of the European Community 2002, 76,
[82] Jungbluth EUR 2010, 471.
[83] Peter-Christian Müller Graf, Unternehmensinvestitionen und Investitionssteuerung im Marktrecht, 1984, S. 316.
[84] Hatje, 2010, 629.

The social market economy finds also broad support by political parties. Despite the fact that in the political landscape of Germany political parties hold different opinions concerning the degree of state intervention in the economy, all political parties which have governed Germany after the establishment of the Federal Republic of Germany in 1949 had and still have one thing in common: the commitment to the social market economy as Germany's economic system[85]. Accordingly it has not only been the CDU, but also the FDP[86] the SPD[87] and the Green Party[88] that have invoked the social market economy for their idea on socioeconomic policy making. Interestingly enough, the social market economy is interpreted variously by the above mentioned political parties. The SPD as Germany's social democratic party traditionally underlines the importance of social justice as part of the social market economy. Initially the SPD refused the idea of the social market economy in the 1950s. With the Godesberger Programm[89] of November 1959 the SPD then changed fundamentally its party goals and turned away from the ideal of Marxist socialism towards a capitalist system with private property and free market principles complemented by the social policy of the state. The SPD was no longer only the party of the working class but the party of the people. The social democrats incorporated the social market economy in their party programme in 2007 and 2013. The FDP traditionally emphasizes the importance of the liberal elements of the social market economy whereas the Green Party highlights the importance of an ecological-social market economy. But it is without doubt the CDU that can claim to be the originator of the concept of social market economy. The Christian democrats propagated the social market economy in its campaign for the first elections after World War II in 1949. The CDU won the elections, Konrad Adenauer became Chancellor and Ludwig Erhard became minister

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[85] Jeremy Leaman 2009, The Political Economy of Germany under Chancellors Kohl and Schröder, 30.

[86] Karlsruhe Programme of the Liberal Democratic Party 2012
http://www.freiheit.org/files/288/2012_Karlsruher_Freiheitsthesen.pdf.

[87] Entweder wir modernisieren, und zwar als soziale Marktwirtschaft, oder wir werden modernisert, und zwar von den ungebremsten Kräften des Marktes, die das Soziale beiseite drängen würden.
Schroeder Regierungserklärung 14.03.2003.

[88] Berlin Programme of the Green Party 2002
http://www.boell.de/downloads/publikationen/2002_003_Grundsatzprogramm_Buendnis90DieGruenen.pdf

[89] http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3049.

for economic affairs , who started to apply and implement the social market economy in German economic politics and became father of the so called German economic miracle. Alfred Müller-Armack, one of the founding fathers of the concept, belonged as well to the CDU. In its so called Dusseldorf guidelines from 1949 the CDU defined the social market economy as follows[90]:

> "The social market economy is the socially bound constitution of the commercial economy, in which the endeavours of free and able people are set in an order which yields a maximum of economic advantage and social justice for all. This order is created by freedom and obligation which in the social market economy express themselves through genuine competition and independent monopoly control".

It is important to note that the established neutrality of the Basic Law does not mean that the discretion of the legislator is unlimited. On the contrary, there are normative provisions in the Basic Law restricting the freedom of the legislator in organizing economic life. The entirety of these provisions constitutes the economic constitution of the Basic Law. The realization of the social market economy as Germany's economic order is subject to compliance with the commitments of the economic constitution of the Basic Law. In the following the economic constitution of the Basic Law shall be further analyzed.

3. The Economic Constitution of the Basic Law

The Basic Law contains in its first section a catalogue of enforceable fundamental rights and liberties[91].These rights and liberties, as they comprise classical freedoms in the liberal tradition are first and foremost aimed at guaranteeing the freedom of individuals to participate in civil and political life without being subject to discrimination and to protect this freedom from unwarranted infringement. It is important to note that the Basic Law does hardly contain fundamental economic or social rights. Basic social rights as such must be distinguished from classical civil rights and liberties. Basic social rights are aimed to complement the civil rights and liberties since they

[90] http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3094.
[91] The Basic Rights in the Weimar Constitution recognized basic rights as goals which were not directly enforceable, see Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2012, 38.

cannot be enjoyed without a certain degree of social security. Basic social rights in the form of subjective rights may entitle individuals to refer directly to such rights, whereas basic rights included in provisions defining objectives of the state do not endow individuals with rights but oblige the state and its institutions to respect them. Unlike the Weimar Constitution of 1919, the Basic Law is very cautious in formulating enforceable fundamental social rights. The only reference to social fundamental rights is Article 6IV GG which states that every mother is entitled to protection and care. The main reason for refraining from incorporating norms protecting social entitlements is that the authors of the Basic Law wanted to avoid the need for such rights to be constantly adjusted to changing economic and social conditions[92].

In detail, the constitutional framework offered by the Basic law contains several fundamental rights which form the backbone of the German economic constitution. As regards this, Article 2 I GG has to be seen as the most important provision of the economic constitution. This fundamental right refers in particular to the right of self- determination and contains constitutive elements of a market economy, like the general freedom of action, the freedom of contract, the freedom of commerce and industry and the freedom of economic initiative. To continue, the freedom of profession, work and trade guaranteed by Article 12 I GG aims to ensure free competition among market participants which is a precondition for a proper functioning market order based on supply and demand. Article 14 I GG of the Basic Law guarantees the right to property including corporate ownership and its economic usability. The right to form corporations and other associations is covered by Article 9 I GG. Article 9 III GG refers to the right to form and join economic or trade association which are entitled to negotiate the basic conditions of the economic system on the micro and macro level through free collective bargaining, strikes and lock-outs. The entirety of these economic rights is an integral part of the Rechtsstaatprinzip[93]. This constitutional principle is commonly translated as a state under the rule of law. However, such a translation is imprecise and can be deceptive. This has to do with the fact that the German concept of the Rechtstaatsprinzip is in its scope wider than the traditional principle of the rule of law which is an integral part of other

[92] http://www.europarl.europa.eu/workingpapers/soci/pdf/104_en.pdf.
[93] Nigel Foster, 2002:163-171; Ulrich Karpen, 1988, 169-188.

constitutions. The notion itself- Rechtsstaat- portends the supremacy of law (*Recht*) within the state (*Staat*). The earlier concept of a formal (f*ormeller*)Rechtsstaat has been complemented by the concept of a substantial (*materieller*)Rechtsstaat. Formeller Rechtstaat means the formal guarantee of the supremacy of the law and control of state power, whereas the materieller Rechtsstaat means that that administrative authorities and courts are bound by both, law and statute, and this includes a duty to take into account basic constitutional values, particularly the basic rights. It can be inferred from this, that the limitation of the power of the state by the establishment of fundamental rights is an integral part of the Rechtsstaatsprinzip. To summarize, in economic terms the Basic Law guarantees labour, capital, associations and coalitions, as keystones of the German economic order[94].

4. The Social State Principle (Sozialstaatsprinzip)

It is generally acknowledged among German constitutional scholars that the social market economy constitutes an approach to meet the requirements imposed on the German state by the social state principle"[95]. This principle is one of the basic tenets of the Basic Law and as such enshrined in two constitutional clauses. In Article 20 (1) GG Germany is defined as a democratic and social federal state. Article 28(1) GG stipulates that the constitutional order in the Länder must conform to the principles of a republican democratic and social state governed by the rule of law within the meaning of the Basic Law. Worth to mention is furthermore, that the social state principle has been incorporated in Article 23 of the GG, which allows for the transfer of sovereignty to the European Union. The involvement of Germany in the development of the European Union is bound to a specific normative framework : the European Union must be committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity. Furthermore the European Union must ensure a level of protection of basic rights essentially comparable to that afforded by

94 Ulrich Karpen, 1991: 87-110.
95 See Hans Zacher 1995, 1060; Hans F. Zacher 1989, 124; Joerges/ Rödl, Social Market Economy- as Europe´s Social Model? 2004, 13; Horst Küsters, 2007, 9.
Albert Schug, 2011,366.

the Basic law. Article 23 GG makes reference to the provisions of Article 79 II, III which contain the unchangeable constitutional state policy goals.

As regards its constitutional meaning and scope, it is rather difficult to exactly determine the content of the social state principle. This can be traced back to the fact, that the social state principle is rather a not well-defined provision of the Basic Law. As a matter of fact, it is above all the case law of the BVerfG that further defines the social state principle. As regards this subject, it is important to note that the Sozialstaatsprinzip is very often operated in connection with other basic rights, such as the right to human dignity, Article 1 I GG, the right to freely develop one's personality Article 2 II 1 GG and the inviolability of the person, Article 2 II GG. The combination of the Sozialstaatsprinzip with other constitutional rights allows the BVerfG to give the principle some concrete meaning[96].

In one of its earliest judgments- the so called *Hinterbliebenenversorgung* case[97], the BVerfG laid down the basis for subsequent judgments on the scope of the social state principle. The factual situation underlying the decision was the following: The complainant was a widow of an attorney who had lost his life as a soldier during World War II. As a mother of three children between the ages of 6 and 16 the woman complained that the money she had received in accordance with the relevant law providing for the dependants of war victims amounting to 183 German Marks per month, was not enough to make ends meet. In addition, the complainant made clear that she was incapable of working because of her disability. The plaintiff among others invoked her right to human dignity. The Court came to the conclusion that the right to human dignity did not entitle individuals to claim directly social benefits from the state. Despite this fact, the Court stated that Germany was committed to the Sozialstaatsprinzip. The Court made clear that the Sozialstaatsprinzip was addressed to the legislator and obliged him to strike for the creation of bearable living conditions for those who suffered hardship resulting from the Hitler regime. Moreover, the legislator was obliged to balance conflicting interests and thus, to ensure a fair social order. Only in cases where the state deliberately neglected its

[96] Elisabeth Pascal, 2008, 880.
[97] BVerfGE 1, 97; Hinterbliebenenrente; see for this: Manfred Hinz, Namibia Law Journal 2010.

obligation resulting from the social state principle, holders of fundamental rights had the right to invoke social benefits from the state.[98].

It can be inferred from this judgment that the primary goal of the Sozialstaatsprinzip is the creation of social justice. The social state principle is a normative binding constitutional principle addressed to the state and all its organs binding them to social activity. As a *Staatszielbestimmung*, meaning a norm describing a goal to be pursued by the state, the Sozialstaatsprinzip gives the state not only the right but also the duty to shape a social just order[99]. The Sozialstaatsprinzip is not a directly applicable law, but rather an appeal to all state organs to engage in social activity. While the BVerfG set the objective to be achieved by the state it did not lay down any guidelines in which manner the creation of social justice has to be realized. According to consistent case law of the Federal Constitutional Court this task is up to the legislator who has a large discretion to determine what is social in particular cases. As regards this, the BVerfG stated in the *Freelance Broadcasting Employees case* the following[100]:

> "This principle of the social State may certainly be of importance for the $interpretation of basic rights, as well as for the interpretation and constitutional evaluation of laws that restrict basic rights pursuant to a proviso of law. It is, however, not capable of limiting basic rights in the absence of specification by the legislature, i.e., directly. It places a duty on the State to provide for a just social order in fulfilling this duty, the legislature is endowed with a broad
>
> margin of discretion In other words, the principle of the social State sets a task for the State but does not say anything as to how this task is to be accomplished in detail -- in any other case, the principle would come into conflict with the principle of democracy: the democratic order established by the Basic Law would, as the system of a free, political process, be decisively restricted and curtailed if

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[98] According to Alexy, the right to an existential minimum is a unwritten constitutional right, interpretatively derived from the above mentioned constitutional rights provisions Robert Alexy 2002:290.

[99] Phillip Kunig 1988, 194.

[100] BVerfGE 59, 231/ See for the Translation: https://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=640.

political decision making were to be made subject to a constitutional obligation that could only be met in a specific, stipulated manner".

From this it can be inferred that the Court grants the legislator a wide leeway of discretion to fulfil his obligations resulting form the social state principle. The social state principle has therefore to be seen as a provision with a rather programmatic character. Notwithstanding, the social state principle is constitutionally protected and cannot be changed by legislation. According to Article 79 III GG constitutional principles are fundamental components of the German constitution and immune from any constitutional amendment. Due to the fact that it is the only provision of the Basic Law which explicitly refers to social conditions, the social state principle plays a pivotal role.

Moreover, the provisions of the Basic Law and all other laws below the constitution must be interpreted in the light of this constitutional principle. Thus, the social state principle establishes the boundaries and infuses the meaning of all economic rights created by the Basic Law[101]. Accordingly, there is a large number of judgments in which the BVerfG made reference to the social state principle as a means to interpret individual basic rights..

5. Interim Conclusion

It was shown that the original concept of the social market economy is not explicitly reflected in the economic constitution of the Basic Law. Market conformity, which is a major element of the original concept of the social market economy is not used by the BVerfG as a yardstick for assessing the constitutionality of legislative action. The Court established the doctrine of neutrality of the Basic Law, allowing the legislator to pursue any policy he wants, as long as the Basic Law is respected. The doctrine of neutrality, however, must be seen in relative terms. While it is true that the Basic Law lacks a clear statement on a specific economic model, its provisions do not give room for extreme economic models. The embodiment of the social state principle rules out a laissez faire market economy and the fundamental basic rights of the economic constitution rule out a planned economy respectively[102]. In the view of the former justice at the BVerfG Di Fabio the economic order under the Basic Law as a general rule must reflect a market

[101]Kommers 1997, 247.
[102] Badura AöR 92(1967), 382(404);R. Schmidt, Öffentliches Wirtschaftsrecht, 1990, 73.

economic system[103]. By saying that he refers to the functional guarantees of a market economic system reflected in the basic rights, namely in the Article 2,9,12,14 GG through which a market economic system could be established. Thus, these fundamental rights formed the backbone of the economic constitution of the Basic Law. The former president of the Federal Constitutional Court, Hans Jürgen Papier went even further and stated that there was no alternative to the "social market economy" in Germany[104]. The same view was shared by the former justice of the BVerfG and former president of the Federal Republic of Germany Roman Herzog[105], who stated that it was not right to see the social market economy only at the discretion of the legislature. According to him, the social market economy had its firm place in the basic principles of the constitution.

D. The Reconciliation of Economic Freedom with Social Justice in the Case Law of the BVerfG

In the previous section it was shown that the formation and guarantee of a social market economy is a political task depending on the will of the legislator and associated therewith on political majorities, provided that the values of the Basic Law are respected. Against the background that the market conformity which constitutes a major element of the original type of the social market economy is not considered as an absolute criterion for the assessment of the constitutionality of state interventions in the economy it is therefore necessary to examine how conflicts between individual and collective self- determination on the one hand, and social state intervention

[103]"Die Wirtschaftsordnung unter dem Grundgesetz muss daher eine grundsätzlich marktwirtschaftliche sein". Udo Di Fabio in Maunz/Dürig, GG Art.2 Rn. 76, 2013.

[104] Hans Jürgen Papier; Grundgesetz und Soziale Marktwirtschaft, 2009, 21: „ Das Grundgesetz bildet eine solide und tragfähige Grundlage einer freiheitlichen Wirtschaftsordnung. Es ist zwar nicht auf ein bestimmtes Wirtschaftssystem gerichtet,, ermöglicht aber gerade auch die „Soziale Marktwirtschaft"; von Verfassungs-und Gemeinschaftsrechts wegen ist sie dem Grunde nach – letztlich alternativlos".

[105] "Es ist falsch, dem Grundgesetz zu entnehmen, daß es die soziale Marktwirtschaft ins freie Belieben des Gesetzgebers stellt. Die soziale Marktwirtschaft hat ihre feste Verankerung in den Grundsätzen der Verfassung und – was das wichtigste ist – es müssen schon handfeste und beweisbare Funktionsstörungen vorliegen, um sie ohne Verfassungsbruch in ein anderes Wirtschaftssystem zu überführen"; Roman Herzog, 1974 , http://www.zeit.de/1974/14/sperre-fuer-den-sozialismus/seite-4

on the other, are resolved. The BVerfG emphasizes in its subsequent case law that it is the legislator´s task to adopt regulations that pays regard to "constitutional requirements that gives effect to the concerns of all those involved and affected[106]. This means that the legislator, on the one side has the task to respect fundamental rights, and on the other, to take into consideration duties following from the social state principle to bring about social justice. This task can only be achieved by intervening in the economy which as a result narrows down the economic freedom of fundamental rights holders. This situation reflects as well the uneasy relationship between the Rechtsstaatsprinzip and the Sozialstaatsprinzip[107]. To recall, whereas the Recthsstaatsprinzip protects the individual from state encroachments - the social state principle createsduty for the state to realize a- just social order arising from the needs of the modern industrial society[108].

As stated above, the resolution of these conflicts is in the first instance addressed to the legislator who himself is bound to the Basic Law. However, the BVerfG plays an equally crucial role in this process. This is due to the fact that the social market economy needs necessarily to comply with the Basic Law and only the BVerfG is allowed to interpret the Basic Law. The provisions of the Basic Law are rather indeterminate and thus the scope of protection offered by the Basic Law to fundamental rights holders on the one

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[106] BVerfGE 59, 231(Freie Mitarbeiter), See for Translation: https://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=640

[107] In the 1950s a discussion concerning the “Rechtsstaat versus Sozialstaat” controversy emerged. Ernst Forsthoff and Wolfgang Abendroth argued about the question whether and how far the idea of the Rechtsstaatsprinzip which obliges the state to respect the constitutionally guaranteed freedom of individuals is compatible with the Sozialstaatsprinzip which commits the state to intervene in the market process to ensure social justice.
Following a conservative interpretation, Ernst Forsthoff argued that the reference made in the Basic Law to the Sozialstaatsprinzip did not lead to any substantial changes in the provision of rights. He stated that the reference to social must be interpreted as the expression of a mere programme and, thus, was relegated to administrative activities to be embarked upon by the State as the need arose. For him the Sozialstaatsprinzip was opposed to the Rechtstaatsprinzip and the latter enjoyed precedence. Wolfgang Abendroth on the other hand referred to the achievements of social movements since the era of industrialisation and their right to sociality. According to him, social, in terms of the Grundgesetz, had to be interpreted as meaning the recognition of social rights against the State and, by recognizing social rights, the recognition of the obligation to limit liberal rights; See Forsthoff , Ernst. 1954. “Begriff und Wesen des sozialen Rechtstaates.” Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 12:8–35; Abendroth, Wolfgang. 1954. “Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland.” Pp. 279 et seq. in Festschrift Ludwig Bergsträsser, edited by A. Herrmann. Düsseldorf: Droste; Christian Joerges, Rechtsstaat and Social Europe, 2010, 66f.

[108] Elisabeth Pascal, 2008, 884.

hand and the duties and obligations resulting form the Basic Law on the other are determined by the constitutional review of the BVerfG which has the monopole to interpret the Basic Law. Constitutional review in Germany - understood as the power of BVerfG to assess the constitutionality of legislative or administrative acts plays a significant role in German politics. This can be mainly attributed to Germany´s experiences during the Nazi dictatorship. Accordingly,in the course of negotiations of the Constitutional Convention in 1948 to draft the Basic Law in Bavaria at Herrenchiemsee, Konrad Adenauer made the following statement: "Dictatorship is not only necessarily dictatorship by a single person. There is also dictatorship by a parliamentary majority. And we want protection against such dictatorship in the form of a constitutional court"[109]. As a matter of fact, the BVerfG as the highest court in Germany is entitled to safeguard the values of the constitutional order and to defend the rights of individuals against governmental intrusion. The BVerfG provides the legislature with guidance on the content and scope of constitutional provisions and associated with that influences the formation of the social market economy. The task of the Court is to find the balance between shaping political reality according to the constitution and adapting the constitution to the needs and possibilities of reality.[110] But the BVerfG is not only the guardian of the Basic Law but also an "countermajoritarian institution"[111], which provides politics with guidance. It moves between the poles of law and politics as Donald Kommers states correctly[112]. In the following, the methodologies of constitutional interpretation and justification of restrictions of fundamental rights as utilized by the BVerfG will be further examied.

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[109] Verhandlungen des Parlamentarischen Rates, 2nd session, p.25, cited in: Georg Vanberg, 2005, 1.

[110] Karpen, 1988, 179.

[111] Georg Vanberg, 2005, 175.

[112] " This is a study of the Federal Constitutional Court ... of West Germany. My principal goal is to ... describe its relationsship to German politcs. That courts of law, constitutional courts especially, are parts of political systems is a proposition no longer to be denied; Kommers, Donald P.: Judicial Politics in West Germany. A Study of the Federal Constitutional Court, Beverly
Hills – London 1976, p. 11. Cited in: Robert Chr. van Ooyen · Martin H. W. Möllers in: Das Bundesverfassungsgericht im politischen System, 2005, 9.

I. Methods of Constitutional Interpretation

The Basic Law as being only an outline of the body of doctrine becomes the real "constitution" only in the course of judicial interpretation[113]. Since the wording of provisions of the Basic Law is very general, constitutional interpretation is of significant relevance to determine the scope of protection offered by fundamental rights. As a written constitution the Basic Law is not self-actualizing and it therefore needs to be maintained over time which as a matter of fact necessitates both interpretation and adaptation to changing circumstances[114]. Accordingly, it is important to examine which judicial technique the BVerfG employs to interpret the substance of provisions of the Basic Law, in particular when fundamental rights and or fundamental principles are in conflict.

1.Classical Approaches to Constitutional Interpretation

The classical methodology of constitutional as well as statutory interpretation used in Germany goes back to Friedrich Carl von Savigny, the founder of the historical school of jurisprudence[115]. Savigny distinguished between four methods of interpretation, namely grammatical-, systematic-, historical and teleological interpretation. The latter is also referred to as purposive interpretation. These methods are principally recognized and utilized by the BVerfG as methods for the interpretation of the Basic Law, as the *Tax Levy Case*[116] reveals. As regards this subject, grammatical interpretation refers to the determination of the meaning of a particular word or sentence of a constitutional provision. In systematic interpretation, the emphasis lies on clarifying the meaning of a legal norm by reading it in combination with the constitution as a whole. This approach relies upon the unity of the legal world.[117]**.** In the Southwest – State case[118] the BVerfG handed down an

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[113] Peter E. Quint 2009, 1-14.
[114] Kommers 2007, 35, Germany: Balancing Rights and Duties in: Interpreting Constitutions: A Comparative Study.
[115]See Friedrich Carl von Savigny 1840, System des heutigen römischen Rechts, Berlin, Veit und comp., 1840, vol. 1, p. 213;Winfried Brugger 1994, 396.
[116]BVerfGE 11, 126(18) – Nachkonstitutioneller Bestätigungswille: (…) „ Diesem Auslegungsziel dienen die Auslegung aus dem Wortlaut der Norm(grammatische Auslegung), aus ihrem Zusammenhang(systematische Auslegung), aus ihrem Zweck (teleologische Auslegung) und aus den Gesetzesmaterialien und der Entstehungsgeschichte (historische Auslegung).“; see also Judith Engelke 2010, 3.
[117] Brugger 1994, 398.
[118] BVerfG, 23.10.1951- 2 BvG 1/51 (Südwestaat).

essential decision for the systematic interpretation of the Basic Law. The Court made clear that the Basic Law was internally coherent and constituted a structural unity. Accordingly the Basic Law must to be interpreted as a whole, meaning that clauses or provisions have not to be interpreted independently, but instead, every constitutional provision must be interpreted in such a way that it was compatible with the fundamental principles of the constitution and the intensions of its authors[119]. With employing the teleological analysis the interpreter attempts to identify the ratio legis, meaning the spirit and purpose behind the various provisions of the Basic Law or the document as a whole[120]. Historical interpretation of a constitutional provision attempts to explore the intention of the founding fathers at the time when the constitution was adopted, whereby both the specific and the general declarations of intension are of relevance[121]. The grammatical, historical, and systematic modes are strongly based on constitutional textualism which means that the Court is adhering to the constitutional text while doing the interpretation. The teleological method, on the other hand, is a more open – ended approach to judicial decision making[122]. These modes of interpretation do not preclude each other but are complementary. However, the chosen mode of interpretation must be in conformity with the Basic Law *(Verfassungskonforme Auslegung*[123]). Accordingly, if several methods of interpretation are applicable and one leads to an unconstitutional, the other to a constitutional result, then the method of interpretation which complies best with the Basic Law must be given priority[124].

2. Objective Order of Values

The Basic Law constitutes according to the BVerfG an *objective order of values* (*Objektive Werteordnung des Grundgesetzes*). This doctrine of German constitutional law is of particular importance for the interpretation

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[119] Kommers 1997,47.
[120] Bruggers 1994, 397; Kommers 2012, 67.
[121] Brugger2 1994, 397.
[122] Kommers 1997, 49; Finck 1997, 129; in: Judicial Review: The United States Supreme Court Versus the German Constitutional Court, Boston College International and Comparative Law Review Volume 20, Issue 1 Article 5 , 123-157.
[123] See BVerfGE 2, 266, 282- Soviet Zone Case.
[124] Alfred Rinken 2002, 70.

and application of the provisions of the Basic Law. The BVerfG created this doctrine in its landmark decision to the Lüth case[125]**.** In this case the Court had to deal with the question whether fundamental rights have in addition to its vertical effect also horizontal effect. To clarify, the vertical effect refers to the applicability of fundamental rights in protecting individuals against the state. Horizontal effect refers to the ability of fundamental rights to affect legal relations between private parties[126]. It classified the relationship between fundamental rights and private law as follows:

> The primary purpose of the basic rights is to safeguard the liberties of the individual against interferences by public authority. They are defensive rights of the individual against the state[127]. (...)It is equally true, however, that the Basic Law is not a value-neutral document [citation from numerous decisions].Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law [public and private]. It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. Thus it is clear that basic rights also influence [the development of] private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.[128]

The significance of the Lüth decision has to be seen in the fact that the scope of applicability of fundamental rights was extended. Fundamental rights are considered negative and positive as well as subjective and objective in

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[125] BVerfG, 15.01.1958 - 1 BvR 400/51 Lueth, BVerfGE 7, 198, 205.
[126] See for this Chantal Mak 2008, Introduction xxvii.
[127] Kommers 1997: 369, BVerfGE 7, 198, 204:' Ohne Zweifel sind die Grundrechte in erster Linie dazu bestimmt, die Freiheitssphäre des einzelnen vor Eingriffen der öffentlichen Gewalt zu sichern; sie sind Abwehrrechte des Bürgers gegen den Staat'.
[128] Kommers 2012, 444, BVerfGE 7, 198, 205: Ebenso richtig ist aber, daß das Grundgesetz, das keine wertneutrale Ordnung sein will, in seinem Grundrechtsabschnitt auch eine objektive Wertordnung aufgerichtet hat und daß gerade hierin eine prinzipielle Verstärkung der Geltungskraft der Grundrechte zum Ausdruck kommt. Dieses Wertsystem, das seinen Mittelpunkt in der innerhalb der sozialen Gemeinschaft sich frei entfaltenden menschlichen Persönlichkeit und ihrer Würde findet, muß als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten; Gesetzgebung, Verwaltung und Rechtsprechung empfangen von ihm Richtlinien und Impulse. So beeinflusst es selbstverständlich auch das bürgerliche Recht; keine bürgerlich-rechtliche Vorschrift darf in Widerspruch zu ihm stehen, jede muß in seinem Geiste ausgelegt werden".

nature[129]. Thus, fundamental rights do not only constitute guarantees of negative rights of citizens against the state authority but to the same time they contain a value. This results in the obligation of the state to ensure that this objective order of values becomes a constituent element of the general legal system. To clarify, a positive right is distinct from an objective value. The latter refers to the organization of the state and its duty to create and maintain an environment conducive to the realization of values. Conversely, a positive right as stated above is an entitlement of individuals against the state[130]. Accordingly, the fundamental rights of the Basic Law have an effect on the development of private law meaning that each private law provision must be in accordance with this objective system of values and interpreted within the meaning of it[131]. In regard of the way how this should be realized, the BVerfG stated the following:

> "The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the order public- in the broad sense of the term- that is, rules which for reasons of the general welfare also are binding on private legal relationships and are removed from the dominion of private intent. Because of their purpose these provisions are closely related to the public law they supplement. Consequently, they are substantially exposed to the influence of constitutional law. In bringing this influence to bear, the courts may invoke the general clauses which, like Article 826 of the Civil Code, refer to standards outside private law. 'Good morals' is one such standard. In order to determine what is required by social norms such as these, one has to consider first the ensemble of value of concepts that a nation had developed at a certain point in its intellectual and cultural history and laid down in its constitution".[132]

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[129] Kommers 2007, 181.
[130] Kommers, 2007, 184.
[131] Kommers, 1997, 370. BVerfG 7, 198, 205.
[...]A dispute between private individuals concerning rights and duties emanating from provisions of private law- provisions influenced by the basic rights- remains substantively and procedurally a private –law dispute.[Courts] apply and interpret private law, but the interpretation must conform to the Constitution.
[132] Kommers, 2012, 444; BVerfGE 7, 198, 206.

From this it can be inferred that the BVerfG tasked ordinary courts to make the influence of fundamental rights on private law provisions effective by invoking general clauses like good morals and good trust which refer to standards outside private law.

Moreover, the objective order of values of the Basic Law is ordered hierarchically. On top of this free democratic basic order is the value of human dignity followed by the values of human life and the free development of one´s personality.[133]

3. **Human Dignity in Constitutional Interpretation**

It can be inferred from the foregoing that it comes as no surprise that human dignity plays a pivotal role in German constitutional law. This centrality is expressed by giving human dignity a prominent place in Article 1 I GG which has the following wording: Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The guarantee of human dignity in German constitutional law constitutes a “fundamental constituent principle”[134], meaning that it is the” basis of all that follows, the highest value[135] within the system of constitutionally protected values [136]” in the Basic Law. The commitment to the social state principle has to be understood in connection with the commitment to human dignity. As will be shown below in the case study section, the BVerfG utilizes human dignity very often for the concretization of the common good, the main criterion for assessing the constitutionality of encroachments upon citizens basic rights by the legislature.

The term human dignity poses difficulties as there is no universally accepted way of how to define it. Human dignity is often said to have originated in the Judeo-Christian tradition, according to which man was made in the image of God[137]. From this it follows that a divine spark is reflected in the heart of humans which "establishes man´s humanity and grants him unique status among the creatures in God´s creation, or in other words his dignity"[138]. In

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[133] Kommers, 1997, 54; Kommers, 2007,181.
[134] BVerfGE 50, 166(175).
[135] BVerfGE 5, 85(294).
[136] Margit Cohn, Dieter Grimm, 2013, 203.
[137] See Neomi Rao 2008,205;
[138] Neomi Rao 2008, 206.

the course of the Enlightenment, it was Immanuel Kant[139] with his ideal of the autonomy of the individual who further developed the term human dignity. According to his famous "categorical imperative" man should never be seen merely as a means to an end but always at the same time as an end[140].

In evolutionary terms, human dignity found first mentioning in a constitutional text in Germany in the Weimar Constitution from 1919. Article 151(1) of the Weimar Constitution (hereinafter WRV) stated that the economic order must correspond to the principles of justice with the aim to guarantee everybody an existence in human dignity[141]. The wording of Article 151(1) of the WRV clearly refers to the “socio-economic dimension” of human dignity. Human dignity then found with Article 1 I GG a prominent place with the coming into force of the Basic Law in 1949 as a response to Germany´s Nazi regime[142].

For the interpretation of the term human dignity the BVerfG draws on Günter Dürigs so called “object formula” which as such is based on Kant´s categorical imperative and thus emphasizes the significance of individual autonomy. This formula states that: "Human dignity is violated if man, individually, is degraded to an object, to a mere means, to a fungible factor[143]. Following Dürigs definition the BVerfG in the Life-Imprisonment[144]stated that:

“It is contrary to human dignity to make persons the mere tools of the state[145]”.

The BVerfG then modified and supplemented Dürig´s object formula in it´s decision on wiretapping (Abhörurteil) when it stated that:

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139 Immanuel Kant, Grounding for the metaphysics of morals 39-42(James W. Ellington trans, 1981), Neomi Rao, 2008, 206.

140 See Oliver Lembcke 2013, 207 .

141 Article 151(1) WRV: Die Ordnung des Wirtschaftslebens muß den Grundsätzen der Gerechtigkeit mit dem Ziele der Gewährleistung eines menschenwürdigen Daseins für alle entsprechen. Translation: Margit Kohn and Dieter Grimm in: Human Dignity as a constitutional doctrine 193-203(194) 2013.

142 Neomi Rao, 2008:205.

143 "Die Menschenwürde ist getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretebaren Größe herabgewürdigt wird". Günther Dürig, Der Grundrechtssatz von der Menschenwürde in: Archiv des öffentlichen Rechts 81/2 (1956), pp. 117-157, p 128; Grundgesetz Kommentar Maunz-Dürig Artikel 1, Absatz 1, Rn. 28; Translation: Oliver W. Lembcke in: Human Dignity- a Constituent and Constitutional Principle: Some perspectives of a German Discourse Human Dignity in: Human Dignity as a Foundation of Law, 2013, p. 207-231, 224; ed. Winfried Brugger/Stephan Kirste.;

144 BVerfGE 44, 187(227) [Longlife Imprisonment], see also: BVerfGE 5, 85(204);7, 198 (205); 27, 1(6), 28, 386(391); 50, 166(175).

145 See Kommers 2012, 365.

> (…) "everything depends on determining under which circumstances human dignity might be violated. For general formulas, like the one that man must not be degraded to a mere object of state power, can only 'indicate' a direction where cases of a violation of human dignity may be found"[146].

Dürigs object formula was criticised for its vagueness, particularly for not reflecting the community oriented image of man of the Basic Law. Accordingly, it was then the BVerfG which made clear that human dignity in German Constitutional Law has not only an individual-autonomous dimension, but complementary to that, also a communitarian dimension which obliged the state to ensure conditions for the realization of dignity, particularly to give individuals the opportunity to participate in a political and social community[147]. In the Mephisto case- which addressed the conflict of human dignity and freedom of speech, the BVerfG explained that the right to artistic liberty is based on the Basic Law´s image of man as an autonomous person developing freely within social community. In the Life Imprisonment case then it stated that:

> "The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his or her dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of human persons as spiritual-moral beings endowed with the freedom to determine and develop themselves. This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather that of a person related to and bound by the community. In the light of this community-boundedness, personal liberty cannot be "unlimited in principle". The individual must accept those limits on freedom of action that the legislature deems necessary in the interest of the community´s social

[146]Translation: Oliver W. Lembcke- Human Dignity- a constituent and constitutional principle 224; BVerfGE 30, 1 (25) Abhörurteil, „Was den in Art. 1 GG genannten Grundsatz der Unantastbarkeit der Menschenwürde anlangt, (...), so hängt alles von der Festlegung ab, unter welchen Umständen die Menschenwürde verletzt sein kann. Offenbar läßt sich das nicht generell sagen, sondern immer nur in Ansehung des konkreten Falles. Allgemeine Formeln wie die, der Mensch dürfe nicht zum bloßen Objekt der Staatsgewalt herabgewürdigt werden, können lediglich die Richtung andeuten, in der Fälle der Verletzung der Menschenwürde gefunden werden können".

[147] Neomi Rao, 2008, 221.

> life; yet the autonomy of the individual also has to be protected. This means that the state must regard every individual within society with equal worth[148].

From these rulings, the subjective-negative and the objective- positive dimension of human dignity can be clearly seen. The duty to *respect* human dignity(Article 1 I 2 GG) refers to the former [149]. It gives subjects of fundamental rights a claim against the state to refrain from violating their human dignity[150]. The duty to *protect* human dignity(Article 1 I 2 GG) refers to the latter. It gives on the one hand subjects of basic rights a claim against the state to protect their human dignity against third party violations and on the other obliges the state to establish a legal order that makes the realization of a life in human dignity possible. The latter refers to human dignity as an value as it imposes an obligation on the state to insure that human dignity becomes an integral part of the general order[151]. Accordingly, the BVerfG interprets human dignity very frequently in connection with other provisions of the Basic Law, such as the freedom of personal development Article 2 I GG. This kind of constitutional interpretation takes place to oblige the state to "affirmatively protect human dignity against third persons"[152]. When taking a look at the case law of the BVerfG it will be seen that the Court has very rarely handed down a decision solely on the basis of human dignity. Conversely, there are numerous cases in which human dignity in connection with other provisions of the Basic Law formed the basis of decisions. In these cases, human dignity serves as an interpretation tool for other provisions of the Basic Law. Generally, the combination of another right with Art 1 GG extends the scope of that right[153].

From this it can be concluded that human dignity is inseparably linked to the image of man of the Basic Law and associated with that to the interest of the common good. This is also expressed in the jurisprudence of the BVerfG as will be shown below, when it concretizes the common good on the basis of the Basic Laws human dignity.

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[148]see for the translation: Kommers 2012, 365.
[149] see Herdegen, in Maunz/Dürig, Kommentar zum Grundgesetz, Article 1(1), para. 71.
[150] Examples in this respect are slavery, torture, deportation.
[151] Kommers, 2012, 200.
[152] Neomi Rao, 2008, 201.
[153] Margit Cohn, Dieter Grimm, Human dignity as a constitutional doctrine 2013, 202.

II. The Method of Justifying Restrictions of Fundamental Rights

The Basic Law as interpreted by the BVerfG constitutes a liberal legal and economic order[154]. Accordingly, holders of fundamental rights are granted a general right to liberty. This has significant implications for the understanding of fundamental rights in the frame of review of legislative acts by the BVerfG**.** Every act of legislation that limits the freedom of action of a fundamental rights holder requires constitutional justification"[155]. Against this background, the Basic Law provides for a precept of rule and exception in the sense that all fundamental rights and associated therewith also the fundamental rights belonging to the economic constitution are characterized as rules[156]. These fundamental rights as negative rights make it holders of fundamental rights possible to engage in economic activity free from any state interference. Any derogation from these rules is exceptional and needs justification. This indicates that the derivable fundamental rights from the economic constitution of the Basic Law are not absolute. A restriction is allowed under the consideration of the Rechtsstaatsprinzip and within the limits set in each of the basic rights itself. However, the essence of a fundamental right may in no case be affected, Article 19 II GG. The legislator is furthermore only allowed to intervene in the economy and thus in the protected sphere of fundamental rights holders, if the restriction is justified and proportionate.

1. The Principle of Proportionality[157]

The principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) is the most important judicial technique for resolving conflicts between a right and a competing right or interest. At the core of this technique is the balancing procedure which requires that rights have to be balanced against competing rights or interests.[158] Having its origin in Germany[159], the principle of

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154 BVErfGE 19,101(114) -Zweigstellensteuer, 21, 292(299) Rabattgesetz.
155 Kumm, 2004, 582.
156 Prevailing view, Canaris in: Festschrift für Lerche(1993), p. 873-879; Maunz/Dürig/Di Fabio Art. 2 I recital 76; R. Schmidt, Handbuch des Staatrarechts(HdStR)III § 83 recital 25; v. Arnauld, Die normtheoretische Begründung des Verhältnismäßigkeitsgrundsatzes, JZ 2000, 278 ; Paul Kirchhof, Erwerbsstreben und Maß des Rechts, § 169, Rn. 48. in Handbuch des Staatsrechts der Bundesrebublik Deutschland Band 8(ed. Paul Kirchhof/ Josef Isensee), 2010; Leistner, Die Wirtschaftsverfassung dea Grundgesetzes, § 5, recital 7, in: Wettbewerbsrecht(ed. Gloy/Loschelder/Erdmann) 2010.
157 See for the following: Bodo Pieroth Bernhard Schlink 2008: 279ff., Grundrechte Staatsrecht II; Alfred Kratz 2007: 205, Staatsrecht- Grundkurs im öffentlichen Recht.
158 Kai Möller, Proportionality: Challenging the critics, p. 710.

proportionality was for the first time applied in the Police Law of Prussia in 1794. § 10 II 17 of this statute obliged the police authorities to take appropriate measures to ensure the public order, peace and security[160]. At the end of the nineteenth century then, the Prussian Supreme Administrative Court (*Preussisches Oberverwaltungsgericht*) invoked the principle of proportionality to examine the discretion of the police in the sphere of law and order*(Gefahrenabwehr)*[161].

The principle of proportionality as such has no textual basis in the Basic Law, but notwithstanding it has constitutional status. The BVerfG derives it from the *Rechtsstaatsprinzip* and as such it found its place in German constitutional law for the first time in the landmark decision of the BVerfG to the *Pharmacy-Case* in 1958[162]. This judgment constitutes furthermore the starting point of application of the principle of proportionality in constitutional law[163]. The principle of proportionality also served as a model for other national constitutional courts[164] as well as for the Court of Justice of the European Union (CJEU) and the European Court for the Protection of Human Rights(ECtHR). The principle of proportionality stems from the premise, that any state action capable of encroaching on the private sphere of individuals needs not only a legal basis *(Vorbehalt des Gesetzes)* but the state action itself must also serve the public interest and comply with a proportionality test. This means that the state may only impose restrictions that are justified by a legitimate purpose and which must be absolutely necessary. Thus, dogmatically seen the principle of proportionality belongs to the level of constitutional justification (*Verfassungsrechtliche Rechtfertigung)*

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159 Aharon Barak(2007), Proportional Effect: The Israel Experience, 57 University of Toronto Law Journal 369,370 2007; Moshe Cohen-Eliya&Iddo Porat, American Balancing and German Proportionality: The Historical Origins, (2010) 8 International Journal of Constitutional Law 271-276; Christoph Knill and Florian Becker, 'Divergenz trotz Diffusion? Rechtsvergleichende Aspekte des Verhältnismäßigkeitsprinzips in Deutschland, Grossbritannien und der Europaeischen Union' (2003) 36 Die Verwaltung 447, 454ff; Bernhard Schlink is of another opinion and argues that there is nothing inherently German about the roots of the principle of proportionality, Proportionality in Constitutional Law: Why Everywhere but Here, Duke Journal of Comparative& International Law 2012, Vol. 22, 292- 302.

160 § 10 II 17 Allgemeines Landesrecht ALR von 1794 “Die nöthigen Anstalten zur Erhaltung der öffentlichen Ruhe, Sicherheit und Ordnung, und zur Abwendung der dem Publico oder einzelnen Mitgliedern desselben bevorstehenden Gefahren zu treffen, ist das Amt der Polizey

161 Preussiches Oberverwaltungsgericht , Kreuzberg Urteil 1882 in: Deutsche Verwaltungsblätter 1985, 219.

162 BVerfG, 11.06.1958 - 1 BvR 596/56 Apotheken-Urteil.

163 Kai Möller, 709

164 For an overview see : Julian Zaiden Benvando 2009:27.

and associated with that it has to be subsumed under the concept of limits of limits (*Schranken- Schranken*) of fundamental rights.

The principle of proportionality must be seen in relation with the fact that the BVerfG interprets fundamental rights as principles rather than rights[165]. Principles as such constitute opitimization requirements requiring proportionality analysis in their application [166]. This approach, which goes back to Rober Alexy´s work " A Theory of Constitutional Rights" has major implications on the resolving of constitutional rights conflicts. Alexy explains the need for the distinction between rules and principles as follows:

> (…) the decisive point in distinguishing rules from principles is that principles are norms which require that something be realized to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules. By contrast rules are norms that are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more or less. In this way rules contain fixed points in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree. Every rule is either a rule or a principle[167].

The distinction between rules and principles is of the utmost importance for the rationale behind the idea of resolving of constitutional conflicts by optimization. For Alexy a conflict between legal rules is solved either by subsuming one of the rules under the other as an exception to it or by declaring one of them invalid. In his point of view a rule is valid or is not[168]. The collision between two principles, by contrast must take place on the basis of the *Law of Balancing* which states that: " The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the

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[165] " Keine bürgerlichrechtliche Vorschrift darf im Widerspruch zu den Prinzipien stehen, die in den Grundrechten zum Ausdruck kommen" BVerfGE 81, 242[254]- Handelsvertreter

[166] see Mattias Kumm, Constitutional rights as principles: On the structure and domain of constitutional justice, I.Con, Volume 2, Number 3, 2004, pp. 574-596.(576).

[167]Alexy 2002, 47.

[168]Alexy 2002, 49.

importance of satisfying the other"[169]. Accordingly, the conflict is solved in a process of weighing in which none of the colliding principles loses their validity, but the losing principle is considered merely to have less significance in the situation at hand than its counter-principle. This means, that in cases where competing fundamental rights are opposed, the Court weighs the fundamental right of the one group against the fundamental right of the other opposing groups. Whenever the advantage achieved is out of proportion to the disadvantage inflicted, the means is considered to be an unconstitutional infringement on the relevant fundamental right. Almost every decision of the BVerfG that strikes down a statute has its roots in the optimization procedure.

In regard of its structure, the principle of proportionality consists of several principles, namely the legitimacy of the goal, the principles of suitability, necessity and proportionality in the narrow sense. In the first place the state interference in question must pursue a legitimate goal. As such it must be objectively justifiable. As regards this subject, the relevant measure of the state has to serve the common good. The BVerfG determines the common good by considering the image of man of the Basic Law. As was shown, the image of man of the Basic Law is not based on an isolated sovereign individual but rather on that of a person related to and bound by the community. The individual must, according to the subsequent case law of the BVerfG, accept limits of his freedom of action that the legislature deems necessary in the interest of the community´s social life. The value system of the Basic law furthermore centers according to the BVerfG upon the dignity of the human personality developing freely within the social community. The legislator can very often invoke the social state principle and the doctrine of human dignity to restrict derivable fundamental rights from the economic constitution.

The principle of suitability refers to the fact that there must be a rational connection between the interference and the goal: the interference must be suitable to accomplish the purpose of the statute at least to a small extent[170]. The question of the suitability of a policy must be answered from an objective point of view, subjective judgments must not be carried out. An

[169]Alexy, 2002, 49.
[170] Kai Möller 2012:713, Proportionality: Challenging the critics, International Journal of Constitutional Law 2012, Vol. 10 No. 3. 709- 731.

interference which does not serve or is contrary to the purpose of the statute is intelligibly not suitable and accordingly inadmissible. In the same vein, an interference is unsuitable if it is factually impossible to accomplish the purpose of the statute.

The principle of necessity**,** which is also referred to as the principle of the mildest means, requires that out of several available means for achieving the legitimate goal of the statute the one which is less drastic should be pursued. The precondition for the application of this principle is the existence of more than one suitable means for achieving the goal of the statute. Accordingly, if this precondition is not met the question of the mildest means is not at issue. The forth element of the proportionality test is the most important one and it requires the BVerfG to assess whether the state interference is proportional in the narrow sense. In concrete terms, this means, that a state measure is unacceptable if the burden created thereby is disproportionate to the purpose intended by the measure.

The determination of the appropriateness requires a balancing exercise. According to Alexy's theory, it is in the last step where the balancing of the rights or principles is made and it is where it is looked for the optimization of opposed interests. In Alexy´s theory, the suitability and necessity are seen as factual while the last step the proportionality in the narrow sense is seen as the legal balancing of the rights or interests at stake.[171].

It is important to draw attention on the following peculiarity. The principle of proportionality might find application in two different situations, namely in conflicts between the state and a holder of a fundamental right on the one hand and between the state and between two or more fundamental rights holders on the other. In regard of the former, the principle of proportionality is utilized to resolve the precept of rule and exception. Accordingly the state must justify why it has intervened in the derivable rights form the economic constitution of the Basic Law. In this situation fundamental rights holders as a rule enjoy freedom vis a vis the state and fundamental rights may be restricted only inasmuch as this is indispensable. The conflict is solved by the principle of proportionality and associated therewith by

[171] See Michel Rosenfeld, Constitutional adjudication in Europe and the United States: paradoxes and contrasts International Journal of Constitutional Law(2004) 2(4): 663-688.

balancing the conflicting interests. In constellations where the state and two or more fundamental rights holders are in conflict the precept of rule and exception finds no application as in this situation, two fundamental rights holders are in conflict and as a matter of fact two rules are in conflict. This has also implications on the application of the principle of proportionality. To recall, the principle of proportionality is based on the idea to limit the action of the state and its encroachment on fundamental rights. Here, fundamental rights holders face each other and the legislator is obliged to bring about a *practical concordance* between the fundamental right holders.

3.2. The Doctrine of Practical Concordance(*Praktische Konkordanz*)

As an expression of the structural unity of the Basic Law, the principle of practical concordance (*Praktische Konkordanz*) appears to be particularly important for the resolving of conflicts of constitutional rights. This judicial technique belonging to the systematic method of interpretation goes back to the German constitutional lawyer and former president of the BVerfG Konrad Hesse[172]. According to him practical concordance implies that constitutional rights must be harmonized with each other when they are in conflict in such a way that one value does not lose ground against the other. Hesse pleads for finding a balance by way of optimizing the relevant values against each other and thus allowing both values to be exercised to the same time. He puts his idea in the following way:

> "The principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values[173]

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[172] Konrad Hesse 1988, 23.

[173] Kommers 2012, p. 68.; Konrad Hesse 1988, 76: (...) „ Verfassungsrechtlich geschützte Rechtsgüter müssen in der Problemlösung einander so zugeordnet werden, dass jedes von ihnen Wirklichkeit gewinnt. Wo Kollisionen entstehen, darf nicht in vorschneller „Güterabwägung" oder gar „ abstrakter Werteabwägung" eines auf Kosten des anderen realisiert werden. Vielmehr stellt das Prinzip der Einheit der Verfassung die Aufgabe der Optimierung: beiden Gütern müssen Grenzen gezogen werden, damit beide zu optimaler Wirksamkeit gelangen können. Die Grenzziehungen müssen daher im jeweiligen konkreten Falle verhältnismäßig sein: sie dürfen nicht weitergehen als es notwendig ist, um die Konkordanz beider Rechtsgüter herzustellen."

According to Kommers, constitutional interpretation in Germany is anything but a zero-sum game[174]. Practical concordance thus has to be seen in relation with the principle of proportionality which as such is an integral part of the *Rechtsstaatsprinzip*. Notwithstanding that there are similarities between the principle of proportionality and the doctrine of practical concordance, they are not the same. De Schutter puts it in a nutshell:

> "Whereas balancing in the frame of the principle of proportionality means that the right with the highest value or the most important weight will trump above the other, the principle of practical concordance instead rejects the very idea that this may be a desirable outcome: it is not right , it insists in substance, to set aside one claim simply because a competing claim appears, in the particular circumstances of a case, to deserve to be recognized more weight".[175]

The principle of practical concordance should not be confused with the direct effect (Drittwirkung) of fundamental rights. The latter refers to the applicability of fundamental rights in private relationships whereas the former to a situation in which the legislator has enacted a law to regulate the legal relationship between constitutionally protected conflicting interests. Initially, the principle of practical concordance was mainly applied in cases where unconditionally granted fundamental rights were in conflict. Accordingly, in the most prominent cases in which the BVerfG has employed the doctrine of practical concordance, like in the Mephisto[176] -, Mutzenbacher[177]-, Classroom Crucifix Case[178]- and Muslim Headscarf[179] cases unconditionally granted fundamental rights like the freedom of speech or freedom of religion were at the center of the constitutional conflicts. However, as will be shown below, the BVerfG extended in the course of time the application of the doctrine of practical concordance also to conditional granted basic rights.

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[174] Donald Kommers, Interpreting Constitutions, Germany: Balancing Rights and Duties 2007, 203.
[175] See Oliver De Schutter/Francois Tulkens, 2007, 33.
[176] BVerfGE 30, 173.
[177] BVerfGE 83, 130.
[178] BVerfGE 93, 1.
[179] BVerfGE 108, 282.

III. The Social Market Economy in the Case Law of the BVerfG

In the following, an analysis of several legislative acts and respective judgments of the BVerfG in a chronological order will take place. The cases are related to the core of the social market economy in Germany, namely co-determination in large scale enterprises, dismissal protection in small establishments, free collective bargaining and the bipartite health care system. By analysing these cases it is aimed to gain information on how the BVerfG resolves conflicts between derivable rights from the economic constitution of the Basic Law and social state interventions. In this way it will be possible to draw conclusions on the constitutional bounds of the social market economy.

1. Co-Determination in Large Scale Enterprises

Co-Determination, also referred to as industrial democracy has a long history in Germany which goes back to the beginning of industrialisation[180]. It found for the first time constitutional recognition in Articles 156(2)[181] and 165(1)[182] of the Weimarer Reichsverfassung[183]. As an institutionalised process of employee information-, consultation- and participation in the decision-making, Co-Determination may take places at two different levels[184]. First, at the level of the workplace where workers interests in companies with 5 or more employees are represented by works councils (*Innerbetriebliche Mitbestimmung*). This form of codetermination is regulated by the Works Constitution Act (Betriebsverfassungsgesetz). Secondly and alongside the workers' representation in works councils, codetermination may takeplace at

[180] See for this Kommers 2012, 660.
[181] Article 156(2) Weimarer Reichsverfassung: Moreover, in case of pressing need, the Reich may, in the interest of collectivism, combine by law, on a basis of administrative autonomy, economic enterprises and associations, in order to secure the cooperation of all human elements of production, to give to employers and employees a share in management, and to regulate the manufacture, production, distribution, use, and prices, as well as the import and export, of economic goods upon collectivist principles
[182] Article 165(1) Workers and employees shall be called upon to cooperate in common with employers, and on an equal footing, in the regulation of salaries and working conditions, as well as in the entire field of the economic development of the forces of production. The organizations on both sides and their agreements shall be recognized. Workers and employees shall, for the purpose of looking after their economic and social interests, be given legal representation in Factory Workers Councils, as well as in District Workers Councils organized on the basis of economic areas and in a Workers Council of the Reich
[183] BVerfGE 50, 290
[184] Jelle Visser, Joris Van Ruysseveldt 1996, Industrial Relations in Europe, 125-174; Christel Lane 1989, Management and Labour in Europe 226.

the level of the enterprise(*Unternehmensmitbestimmung*). In comparison to one-tier management systems like in the UK, Germany has a two-tier management system where the executive and administrative management of corporations is separated in two different bodies namely the executive management board (Vorstand in a joint stock corporation or Geschäftsleitung in a limited liability company) and the non-executive supervisory board, where the co-determination of employee's takes place(Aufsichtsrat).

There are different forms of co-determination to be distinguished, depending on the form and size of the enterprise. In companies with more than 1000 employees in the mining and steel industry codetermination is regulated by the *Montanmitbestimmungsgesetz* from 1951. In these enterprises workers have extensive rights to codetermination as the supervisory boards have equal numbers of employers' and workers' representatives. In enterprises with between 500 and 1999 employees co-determination is regulated by the One-Third Participation Act(*Drittelbeteiligungsgesetz)* which provides that two thirds of the supervisory board members are shareholder representatives and one third employee representatives. In large scale corporations with more than 2000 employed co-determination takes place on the basis of the Co-determination Act (Mitbestimmungsgesetz, hereinafter MitbG) from 1976[185], which was at the center of a constitutional complaint.

According to § 1 MitbG the following companies are covered by the Co-Determination Act[186]: public limited companies limited partnerships by shares, limited liability companies mutual insurance companies, and cooperatives outside the Montan sector. Under § 7 I MitbG an equal representation of workers and shareholders in the supervisory board of large scale incorporated enterprises is foreseen[187].

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[185] Act on Co-determination by Employees (Co-determination Act) dated 4 May 1976 ("Bundesgesetzblatt", Part I, p. 1153), last amended by the Act dated 23 March 2002 ("Bundesgesetzblatt", Part I, p. 1130).

[186] §1(1) MitbG: Subject to the provisions of this Act, employees shall have a right of co-determination in companies which - 1. are run in the legal form of a joint stock company, a partnership limited by shares, a limited liability partnership or a trade and industrial cooperative; and 2. normally employ over 2,000 employees.

[187] § 7 MitbG: (1) The supervisory board of a company - 1. normally employing not more than 10,000 employees shall consist of six shareholders' members and six employees' members; 2. normally employing more than 10,000 but not more than 20,000 employees shall consist of eight shareholders' members and eight employees' members; 3. normally employing more than 20,000 employees shall consist of ten shareholders' members and ten employees'

The election of the chairman and the vice chairman of the supervisory board takes place on the basis of § 27 I MitbG whereupon a two- third majority of the members of the supervisory board is required[188]. If this majority is not reached in the first ballot, then in a second ballot, the chairman is elected by the shareholders' supervisory board members and the vice chairman by the workers supervisory board members on the basis of the majority of the votes, § 27 II MitbG[189]. Against this background it is common practice that the chairman of the supervisory board belongs to the shareholders side. According to § 29 I MitbG the supervisory boards decisions usually require a majority of the votes. In cases of disagreement between shareholders and workers' representatives in a voting, also referred to as deadlock, the voting has to be repeated. If also in the second voting a tie takes place, it is the chairperson who normally belongs to the shareholders side having a double, tie breaking vote which results in a slight predominance of the shareholders in the supervisory board, § 29 II MitbG[190]. The supervisory board is entitled with several tasks. Its central functions are to appoint and to remove the members of the management board which requires according to § 31(2) MitbG a majority of at least two-third of the members of the supervisory

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members. In the case of companies covered by clause 1 of the first sentence of this subsection, provision may be made in the by-laws (the shareholders' agreement, the articles of association) for clause 2 or 3 of the first sentence of this subsection to apply. In the case of companies covered by clause 2 of the first sentence of this subsection, provision may be made in the by-laws (the shareholders' agreement, the articles of association) for clause 3 of the first sentence of this subsection to apply.
(2) The employees' members of a supervisory board must include -
1. four employees of the company and two trade union representatives, where the board has six employees' members; 2. six employees of the company and two trade union representatives, where the board has eight employees' members; 3. seven employees of the company and three trade union representatives, where the board has ten employees' members. § 7 Mitbestimmungsgesetz

[188] § 27 I MitbG: The supervisory board shall elect a chairman and vice-chairman from among its own number by a majority of two-thirds of the total number of members of which it is required to be composed.

[189] § 27 II MitbG: Where the requisite majority under subsection (1) is not attained during the election of the chairman or vice-chairman of the supervisory board, a second vote shall be taken. In this vote
the shareholders' members of the supervisory board shall elect the chairman and the employees' members shall elect the vice-chairman, in each case by a majority of the votes cast.

[190] § 29 MItbG: (1) The decisions of the supervisory board shall be taken by a majority of the votes cast, save as otherwise provided in subsection (2) and in §§ 27, 31 and 32. (2) Where voting in the supervisory board results in a tie and a further vote on the same subject also results in a tie, the chairman of the board shall have a casting vote. Subsection (3) of §108 of the Joint Stock Act shall also apply to the casting vote. The vice-chairman shall not have a casting vote.

board[191]**.** Furthermore it is entitled to monitor the management of the company's business operations, however the supervisory board is not allowed to interfere with the active management of corporate affairs. The legislator pursued with the formation of the MitbG several objectives[192], namely to rebalance the unequal powers between labour and capital, the democratization of the economy- meaning that conflicts should be solved by discourse and not by power; the improvement of the working and living conditions of employees; the control of economic power of companies; co-operation between labour and capital.

Case 1: The Co-Determination Act 1976[193]

In this case the BVerfG had to deal with the question whether the Co-Determination Act 1976(Mibestimmungsgesetz) was in compliance with the Basic Law. A large number of business forms as well as employers´ associations and a shareholder in an affected company lodged constitutional complaints against the Co-Determination Act 1976. The complainants argued that the above mentioned §§, 7, 27, 29, 31 of the Co-Determination Act violated their right to property, freedom of occupation and freedom of economic activity. In particular it was claimed that the Co-Determination Act violated the property rights of shareholders and firms and constituted a shift towards labour's domination of management.

The Court dismissed the constitutional complaints and upheld the conformity of the Co-Determination Act with the Basic Law. In its reasoning,

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[191] § 31(2) MitbG: The members of the body responsible for the legal representation of the company shall be appointed by the supervisory board by a majority of at least two-thirds of the votes cast by its members.

[192]Draft Law Codetermination Act 1974, http://dip21.bundestag.de/dip21/btd/07/021/0702172.pdf; Heiner Michel 2007, Co-determination in Germany- the recent debate; Walter Muller Jentsch 2008, "Passt die Mitbestimmung zur sozialen Marktwirtschaft?"in: Mitbestimmung 3/2008; Franz Josef Stegmann 2008, From "Cost factor" to "Co-Entrepreneur" Christian Social Teaching, Social Market Economy and the Changing Role of the Worker in Modern Economy,
Gregory S. Alexander 2003, Property as a Fundamental Constitutional Right? The German Example Cornell Law Faculty Working Papers Faculty Scholarship 3-1-2003.

[193] BVerfGE 50, 290 Mitbestimmung[1979].

the Court first made reference to the plaintiffs claim after which the Co-Determination Act conferred absolute parity between capital and labour. The Court rejected this claim by stating that in the event of a deadlock between shareholders and workers, the chairman of the supervisory board who belonged to the shareholder's side had the tiebreaking vote.

The Court then went on to assess the constitutionality of the relevant provisions of the MitbG on the basis of Article 14 I GG. The Court concluded that the provisions in question neither infringed the property of shareholders nor that of enterprises. In the view of the BVerfG the legislator had exercised with the adoption of the Co-Determination Act his discretion to define the content and limit of property, Article 14 I 2 GG[194] in an unobjectionable way.

The Court started its constitutional review of the MitbG on the basis of the right to property of shareholders. In this regard the Court first intensively dealt with the scope of protection provided by Article 14 I 1 GG and held that[195]:

> '[The property guarantee], according to its historical as well as its present significance, is a fundamental basic right which is closely linked with personal freedom. In the system of the basic rights as a whole, it has the task of guaranteeing the holder of the basic right a sphere of freedom in the financial area and therefore enables him to determine his life autonomously]. The constitutionally protected property is characterised in its legal content by private use, that is, the attribution to a person entitled to rights in whose hands it is intended to be `of use' as the basis of private initiative and in self-responsible private interest, and by the power of disposal in principle over the subject of the property, which is not always clearly separable from this use. The use of property is at the same time intended to serve the welfare of people at large Art. 14 II 2 GG.

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194 Article 14 I GG has the following wording: Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

195 Michalsky 1999, 319, BVerfGE 50, 290, 338:"Geschichtlich und in ihrer heutigen Bedeutung ist diese ein elementares Grundrecht, das im engen inneren Zusammenhang mit der persönlichen Freiheit steht. Ihr kommt im Gesamtgefüge der Grundrechte die Aufgabe zu, dem Träger des Grundrechts einen Freiheitsraum im vermögensrechtlichen Bereich zu sichern und ihm dadurch eine eigenverantwortliche Gestaltung seines Lebens zu ermöglichen die verfassungsrechtliche Gewährleistung des Privateigentums als Rechtseinrichtung dient der Erfüllung dieser Aufgabe".

The court went on and made in regard of the contents and limits of property the following statement:[196]

> The concrete scope of the protection afforded by the property guarantee only emerges from the determination of the contents and limits of property, which, under Article 14 I 2 GG is a matter for the legislature. He must be guided by the welfare of people at large, which is not only the reason, but also the limitation of the restriction of the owner. At the same time, the permissible extent of a social binding must also be determined on the basis of the property itself. The guarantee of continuation contained in Article 14(1) 1 GG, the task of regulation contained in Article 14 I 2 GG, and the social liabilities attached to property under Article 14 II GG stand in an unseverable connection. None of these factors must be curtailed beyond what is proper; rather all of them must be brought into a proportionate compromise.

With regard to the protective purpose and the rationale of the right to property the BVerfG then made the following distinction:

> "In so far as the function of property as a safeguard for the personal freedom of the individual is concerned, property enjoys particular protection… On the other hand, the legislature may delimit the content of and define the restrictions to property more strictly the greater its social relevance of function is. The relevant aspect is expressed in Article 14, section 2, i.e. that use and power of disposal do not remain in the sphere of the individual owner, but concern also the interests of other individuals, which are depending on the use of this object of property. Under these circumstances the constitutional command of a common weal-oriented use of property comprises the command of showing consideration of the interests of non-owners, who are

[196] BVerfGE 50, 290, 340 “Die konkrete Reichweite des Schutzes durch die Eigentumsgarantie ergibt sich erst aus der Bestimmung von Inhalt und Schranken des Eigentums, die nach Art. 14 Abs. 1 Satz 2 GG Sache des Gesetzgebers ist. Dieser ist nicht gänzlich frei: Er muß sich am Wohl der Allgemeinheit orientieren, das nicht nur Grund, sondern auch Grenze für die Beschränkung des Eigentümers ist). Zugleich muß das zulässige Ausmaß einer Sozialbindung auch vom Eigentum selbst her bestimmt warden. Die Bestandsgarantie des Art. 14 Abs. 1 Satz 1 GG, der Regelungsauftrag des Art. 14 Abs. 1 Satz 2 GG und die Sozialpflichtigkeit des Eigentums nach Art. 14 Abs. 2 GG stehen in einem unlösbaren Zusammenhang. Keiner dieser Faktoren darf über Gebühr verkürzt werden; vielmehr müssen alle zu einem verhältnismäßigen Ausgleich gebracht werden.”

> themselves depending of the use of the property to safeguard their existence and to shape their life on the basis of self-responsibility".[197]

The Court then made clear that responsibilities following from property must always be proportionate[198]. In this respect, limits were set all the more tightly on the legislator, the more the use and disposal of property remained within the sphere of the owner, since, in that case, a purpose extraneous to the latter which could justify a proportionate property binding would be harder to find. The Court stated that the legislators´ area of discretion with regard to the social relation and the social function of property was relatively was wide in view of its social binding and it became narrower if these conditions were either not or only to a limited extent present.

The Court proceeded to make clear that property according to the Basic Law included also the property of shareholders and that of enterprises. As regards this subject, it distinguished between property in shares and tangible property rights. This distinction was according to the BVerfG for the determination of the extent of social obligation and social function of property of utmost importance. The Court expressed its view as follows:

> With regard to the extent of permissible social binding of share property in the case of enterprises its particular nature is of importance. Share property is property conferred under company law which determines and limits the rights of the shareholder. The owner cannot as a rule use its property immediately and avail himself of the powers of disposal associated with it, but is limited, in respect of use, to the property value, whereas he only indirectly possesses powers of disposal – apart from alienation or encumbrance- over the organs of

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[197] Gunnar Folke Schuppert 111, in: The Constitution of the Federal Republic of Germany 1988(ed. Ulrich Karpen) BVerfGE 50, 290, 341: "Soweit es um die Funktion des Eigentums als Element der Sicherung der persönlichen Freiheit des Einzelnen geht, genießt dieses einen besonders ausgeprägten Schutz.(...) Dagegen ist die Befugnis des Gesetzgebers zur Inhaltsbestimmung und Schrankenbestimmung um so weiter, je mehr das Eigentumsobjekt in einem sozialen Bezug und einer sozialen Funktion steht. Maßgebend hierfür ist der in Art. 14 Abs. 2 GG Ausdruck findende Gesichtspunkt, daß Nutzung und Verfügung in diesem Fall nicht lediglich innerhalb der Sphäre des Eigentümers bleiben, sondern Belange anderer Rechtsgenossen berühren, die auf die Nutzung des Eigentumsobjekts angewiesen sind. Unter dieser Voraussetzung umfaßt das grundgesetzliche Gebot einer am Gemeinwohl orientierten Nutzung das Gebot der Rücksichtnahme auf den Nichteigentümer, der seinerseits der Nutzung des Eigentumsobjekts zu seiner Freiheitssicherung und verantwortlichen Lebensgestaltung bedarf.

[198] Michalski,1999, 323.

> the company. Unlike the case of material property in which the freedom to use the property, the decision as to this and the attribution of the effects of use coincide in the person of the owner, this connectedness is therefore largely dissolved in the case of share property.(…) In principle, the smaller personal relation of share property as against material property shows itself in the divergence, discussed above, of use of the property and responsibility for this use. Unlike the entrepreneur-owner, the shareholder can only operate indirectly with his property; the liability under property law for the economic consequences of wrong decisions does not affect him as a person, but it relates to a limited part of his property sphere. As against this, the important social function of share property is obvious for all to see. Its social relation shows itself in the mere fact that, as a general rule, it consists in the mutual participation with others in a company which is the owner of the means of production. Above all, in order to use the share property, the collaboration of the workers is always needed. The limitations of share property by §§ 7, 27, 29 and 31 MitbestG corresponds to the resultant social binding.

The limitation of the shareholders property in the present case was according to the Court proportionate. For regulations under Article 14 I 2 GG to be constitutional, the right to property could only be limited for reasons of the common good, a faire balance between the owners interest in the free exercise of his/her property rights, and the interests of the community in a certain use or the omission of a certain use of this right must be created[199]. Accordingly, when reviewing the proportionality of the MitbG the Court weighed up the interests of the common good on the one hand and the interests of shareholders on the other. The Court acknowledged that the relevant provisions of the MitbG reduced the power of shareholders as members of the board. This restriction however remained within the ambit of the commitments of property owners in society in general. The Court first stated that according to the government report the MitbG was intended to introduce `a co-participation of shareholders and workers on the basis of equal rights and equal weight in the decision making processes of

[199] Michalski, 1999, 323.

enterprises.' Altough the adopted version of the MitbG did not fully achieve this purpose, it likewise had the task of mitigating by means of allowing participation in the entrepreneurial decision making process the heteronomy of employees´(*Fremdbestimmung)*, which resulted from their subordination under management and organisational power in larger enterprises, and of complementing the economic legitimation of the enterprise management by a social legitimation. Codetermination was also a legitimate political means to safeguard the market economy. It served the common good and could not be regarded as unsuitable or not necessary to achieve this objective. The limitation of the property rights of shareholders was also proportionate in the narrow sense. In this regard the Court only stated that in any case the right of final decision remained with the shareholders.

The BVerfG then went on and assessed the constitutionality of the relevant provisions of the MitbG on the basis of the freedom of occupation, Article 12 I GG. By making reference to its decision in the Pharmacy case[200]it first addressed the issue of the scope of protection offered by Article 12 I GG and stated that[201]:

> Article 12 I GG protects the freedom of the citizen in an area of particular importance in modern society which is based on the division of labour; it guarantees the individual the right to exercise as"occupation", i.e. to base his life-style upon, every activity the individual thinks he is able to perform (…) The guarantee goes beyond the freedom of independently carrying out a business. Even though the basic right aims to protect- economically meaningful- work, it sees it as "occupation", i.e. in its reference to the human personality, which is only fully formed and completed if the individual devotes himself to an activity which is the objective and basis of his life, and through which he can, at the same time, contribute to the overall functioning of society. The basic right thus is important for all social classes; work as an "occupation" is of equal value and dignity for everybody'.

The Court went on and made clear that also the occupational freedom of entrepreneurs was protected by Article 12 I GG. It stated that Article 12 I GG

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[200] BVerfGE 7, 377(397).
[201] Translation: Sabine Michalowski, Lorna Woods, 299;BVerfGE 50,290(194).

protected both the setting up and running of a small or medium sized business but also large scale enterprises. The Court added that while in small and medium sized businesses the personal element of the fundamental right was fully achieved in the economic sphere, this was almost completely lost in the case of large scale enterprises. The freedom of occupation of large scale enterprises was also not an element of the shaping of personality of a human being, but a practice, whose effects went far beyond the economic destiny of the enterprise. This however did not mean that large scale enterprises were excluded from the scope of Article 12 I GG. However, it had implications on the legislator's leeway of discretion to regulate the occupational freedom of large scale enterprises.

The BVerfG then affirmed that the challenged provisions of the MitbestG encroached upon the freedom of occupation of companies running the large scale enterprises.The companies´ representation organs were confined by the new composition of the supervisory board in their freedom of corporate planning and decision making. The BVerfG went on and made it clear that against the background of the size of the enterprises falling in the scope of the MitbG the freedom of occupation of the relevant enterprises lacked the necessary personal feature which formed the core of Article 12 I GG. It stated that those entitled to the freedom of occupation could only exercise this freedom with the support of their employees who were likewise entitled to the fundamental right under Article 12 I GG. In this respect the freedom of occupation had a ‘social relation and social function’.

The Court then went on and carried out a proportionality test. It considered the restriction of the freedom of occupation of the companies running the enterprises as justified by appropriate and reasonable considerations of the public good, however without further concretizing the latter. The Court also had no doubts on the suitability and necessity of the challenged provisions of the MitbG to achieve the goal pursued. The Court also affirmed the proportionality in the narrow sense as the core of Article 12 I GG was only marginally affected. The involvement of workers in the supervisory board would not result in a decisive exertion of influence on the company management, since the right of final decision remained with the supervisory board members, elected by the shareholders.

This case shows clear how far the legislator may go in regulating the economy. The BVerfG and associated with that the Basic Law grants the legislator a wide ranging discretion in regulating the economy. It was shown that the then legislature was not driven by pure economic reasoning when it adopted the Codetermination Act. The functionality of the market process and associated therewith the consideration of market rules, more particular the market conformity did not play a role. On the contrary, the legislator aimed with the formation of the MitbG to rebalance the unequal powers between labour and capital, the democratization of the economy- meaning that conflicts should be solved by discourse and not by power; the improvement of the working and living conditions of employees; the control of economic power of companies; co-operation between labour and capital. The Codetermination Act was according to the BVerfG constitutionally unobjectionable as the management had the tiebreaking vote.

The yardstick to assess encroachments upon fundamental rights is the common good which allows the legislator to encroach upon derivable fundamental rights from the economic constitution of the Basic Law. As regards the scope of protection offered by Article 14 GG it was shown, that the right to property is not absolute but can be limited if there is a concern of the community at stake. As regards this subject, the social obligation of property is the higher the more the particular property is in a social context and has social functions. This has implications for large scale enterprises with more than 2000 employees as they have to accept limitations of their right to property to a greater extent than small and medium sized companies.

2. Dismissal Protection in Small Scale Enterprises[202]

Ideas of the social market economy are reflected in numerous laws in Germany, especially in the field of labour law. One of these laws is the Act on Protection against Dismissal (*Kündigungsschutzgesetz, hereinafter KSchG*),

[202] See for this Manfred Weiss/Marlene Schmidt Labour Law and Industrial Relations in Germany , 125, 126, Jens Kirchner 2010, Key Aspects of German Employment and Labour Law, 137; Judith Sawang 2006, Termination of employment legislation digest- country profile Germany, http://www.ilo.org/dyn/eplex/docs/23/Germany.pdf;
Achim Seifert, Elke Funken Hötzel 2005, Comparative Labor Law & Policy Journal, Volume 25, Number 4, 2005, 487-518.

with which employees are protected against arbitrary dismissals[203]. Dismissal protection is a typical area of law in which a conflict of interests takes place as within this domain both employers and employees are affected in their freedom of occupation. The basic function of protection against wrongful dismissals in Germany has to be seen in the preservation of existing employment relationships (*Bestandsschutz*) and accordingly to reinstate wrongfully dismissed employees. In the majority of cases however, provided the dismissal was unlawful, a reinstatement for several reasons does not take place but instead the dismissed employees are entitled to severance pay. There are several reasons which may be taken into consideration for terminating an employment relationship. In the following the focus will be only on the ordinary dismissal.

The employment relationship in German enjoys far reaching protection. An employer can only terminate an employment relationship where he is allowed to do so. Accordingly, an ordinary dismissal is lawful if the employer complies with the requirements of the KSchG. The core element of employment protection is the social justification of the dismissal as provided in § 1 KSchG. This provision states that a dismissal is only lawful if it is socially justified. As regards this subject, there are only three statutory grounds where a termination is socially justified and lawful, namely if the dismissal is based on reasons related to either conduct, person or urgent operational business. The employer has the burden of proof in regard of the existence of a reason of dismissal. Additionally, the employer must carry out a social selection among comparable employees before selecting the employee to be dismissed by taking into consideration the length of employment, obligations to pay family support and disability, §1 III KSchG. A dismissal related to misconduct or the employee's personality is less likely to be declared as justified by Labour Courts due to strict employment protection standards set by jurisdiction and case law. As a matter of fact employers either terminate the employment relationship for urgent operational reasons or offer severance payments to dissolve an employment relationship even

[203] See: Kündigungsschutz- Alles was Sie wissen sollten, Federal Ministry of Labour and Social Affairs 2013.
www.bmas.de/SharedDocs/.../DE/.../a163_kuendigungsschutz

though the real reason behind the dismissal lies in the behaviour or the capability of the employee [204].

It is important to note, that the requirement of social justification and associated therewith the KSchG is not applicable to all kind of employment relationships. This is only the case if the employment relationship exists at least six months. Furthermore, dismissal protection according to the KSchG does not take place in small scale enterprises which means that statutory protection against dismissal takes only place in companies of a certain size. The so called small scale business clause in § 23 I KSchG states that small establishments with ten or fewer employees are not covered by the statutory dismissal protection. § 23 I KSchG has been changed and amended several times over the last decades and associated therewith the scope of protection has changed. At the beginning of the 1980s and with the change of government in 1982 a paradigm shift in German labour market policy towards the deregulation of the labour market took place. This happened as a response to Germany´s structural unemployment problem. The center-right coalition under the leadership of Helmut Kohl undertook several measures to make the labour market more flexible. The motto was "more market-less state". Accordingly, the Employment Promotion Act was adopted in 1985 which paved the way for the introduction of fixed-term contracts without valid reasons. With this novelty the government aimed to remove hiring barriers by making it possible for employers to employ part-time employees[205].

The Employment Promotion Act had also an impact on the applicability of the KschG. While until 1985 establishments with five or less employees were excluded from the application of the KschG- irrespective whether or not the employees concerned were full time employees- the Employment Promotion Act extended the scope of this exclusion. Accordingly only employees having been employed for at least 10 hours a week or 45 hours a month have had to be taken into consideration for calculating the necessary

[204] Elke J. Jahn 2009, Do firms obey the law when they fire workers? Social criteria and severance payments in Germany, International Journal of Manpower 2009, Vol. 30, No. 7, 672-691(676).

[205] This reform also constituted a turning point in German labour market policy towards a two tier labour market wit a core of labour market insiders enjoying a high level of protection and less protected labour market outsiders, see for this: Patrick Emmenegger/Paul Marx 2011, Business and the development of job security regulations: the case of Germany, Socio-Economic Review 2011, 729(747).

minimum numbers of employees. By hiring part time employees employers could circumvent employment protection rules in a legally unobjectionable way. The same government adopted in 1996 the Act on the Improvement of Employment Opportunities and raised the number of employees for the application of the KSchG from 5 to 10. In doing so, the then acting government aimed to stimulate small employers to create 200.000 new jobs. This amendment of the KschG however was not uncontested and at the center of an concrete review of an statute in the small establishment case(Kleinbetriebsklausel) which will be analyzed below[206]. With the change of government in 1998 then § 23 I KschG was amended and the threshold was lowered again to 5 employees. In 2004 the same government raised the threshold again to 10 employees.

Case 2: The Small Establishment Clause [207]

In the *Small Establishment Clause* case the BVerfG had to deal with the question whether § 23 I KSchG was compatible with the Basic Law. The case concerned a baker who worked for 18 years in a small scale enterprise which employed in total 4 employees and 2 apprentices. The employer terminated the employment relationship with notice due to a long term sickness of the employee. The employee lodged a complaint against this dismissal before the Labour Court Reutlingen which suspended the proceedings and referred to the BVerfG in the frame of a concrete judicial review the question whether Article 23 I KSchG was compatible with the Basic Law. The Labour Court took the view that the exclusion of small firms from the scope of application of the Dismissal Act was not compatible with the freedom of occupation, Article 12 I GG Basic Law.

The BVerfG disagreed with the Labour Court and concluded that § 23 I KschG was in compliance with the Basic Law. The BVerfG stated that, § 23 I KSchG did not violate fundamental rights of employees. This provision rather modified the employment relationship which was a matter of contract law. As

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[206] There is no empirical evidence that a deregulation of dismissal protection in small businesses tends to promote job creation, see: Wagner, J.; Schnabel, C.; Kölling, A. (2001), Wirken Schwellenwerte im deutschen Arbeitsrecht als Bremse für die Arbeitsplatzschaffung in Kleinbetrieben?, in: D. Ehrig, P. Kalmbach (Hrsg.): Weniger Arbeitslose – aber wie?, Marburg; Elke Jahn 2004, Der Kündigungsschutz auf dem Prüfstand, http://www.kas.de/db_files/dokumente/arbeitspapiere/7_dokument_dok_pdf_5115_1.pdf,

[207] BVerfGE 97, 169 Kleinbetriebsklausel.[1998]; See for the following also: Cremer 2012, 188

regards this subject, the Court made clear that private law regulations like the KschG which imposed limits on the contractual freedom of fundamental rights holders concerned the balancing of differing fundamental rights positions. The BVerfG stated that, in the present case the interest of the employee in preserving his workplace was confronted with the interest of the employer to give work only to employees who met his requirements. The Court made clear that both, the employer and employee could invoke their freedom of occupation within the meaning of Article 12 I GG. The legislator was therefore confronted with the problem of practical concordance (*praktische Konkordanz*). The conflicting fundamental rights needed to be conceived of in their interrelatedness(Wechselwirkung) and to be limited in such a way that for those involved they become effective to the farthest extent possible.

The BVerfG made it clear that the Basic Law guaranteed a minimum of statutory dismissal protection. The freedom of occupation, Article 12 I GG and the social state principle, Article 20 (1) GG, [208] obliged the legislature to establish a minimum of statutory dismissal protection. The BVerfG went on to make clear that the legislator had a broad leeway of discretion to fulfil this task. Accordingly, an infringement of Article 12 I GG could be only affirmed, if the legislator did not take adequate measures to comply with its obligation to protect employees from dismissals.

By making reference to the discretion of the legislator to reconcile the conflicting interests the BVerfG emphasized that the appraisal of the economic and social conditions as well as the forecast on the future development but also the effects of the regulation was in the political responsibility of the legislator. The Court made it clear, that the legislator infringed its duty to protect fundamental rights only if a fundamental rights position was subordinated to the fundamental rights position of the other contracting partner in a manner that in consideration of the meaning and range of the affected fundamental right it could not be spoken of an adequate balance any more. The BVerfG rejected such a subordination and stated that the legislator had fulfilled its duty by considering the conflicting interests appropriately. By doing so, the Court did not fail to recognize the fact that the workplace was the economic livelihood of employees. On the other hand, it

[208] See for dismissal protection as a reflection of the social state principle, BAGE 1, 128 (132)

stated that the right of employers to dismiss was also worthy of protection. In a small scale enterprise with few workers, the business success depended more than in large-scale enterprises on the performance and the personality of every single worker. The Court further emphasized the high costs for employers resulting from the protection against dismissal and the high administrative burdens employers were exposed to, due to the dismissal procedure.

The Court concluded that with the amendment of § 23 KSchG the conflicting interests has found a balance which was constitutionally unobjectionable. The Court added, however, that employees who did not fall under the scope of § 23 I KSchG were not unprotected against unfair dismissals. The employers' freedom to dismiss was limited by the general clauses of public policy(§ 138 German Civil Code) and of good faith(§242 German Civil Code). These general clauses of civil law had to be interpreted in light of the employees' constitutionally-guaranteed freedom of occupation. The employer therefore had to respect a minimum of social protection when dismissing employees.

This case shows again the legislators wide leeway of discretion to regulate the economy and associated with that dismissal protection in Germany. This becomes even more obvious when taking into consideration the evolution of § 23 I KSchG. Dismissal protection in Germany enjoys constitutional status as it is covered by the social state principle but also the freedom of occupation. However, as it was shown, the social state principle did not constitute an obstacle for the legislator to relax the rules on protection against dismissal. In the present case, the legislator was backed by the BVerfG as with adopting the small establishment clause the minimum level of dismissal protection was not undermined. Moreover, this case illustrates very well how the BVerfG reconciles competing fundamental rights. It resolved the conflict between the employers´ freedom of occupation guaranteed by Article 12 I GG as a defensive right with the state´s protective duty, also arising from Article 12 I GG towards employees by the doctrine of practical concordance. It gave on the one side the employers´ freedom of occupation priority over the employees´ freedom of occupation. On the other side, it granted

employees the constitutional required minimum protection through the general provisions of private law[209]. This line of reasoning reflects very well the objective order of values of the Basic Law.

3. **The Autonomy of Collective Bargaining(Tarifautonomie)**

The doctrine of the autonomy of the collective bargaining (*Tarifautonomie)* constitutes another fundamental element of the Social Market Economy. As the "Magna Carta[210]" of the German industrial relation system it is characterized by two basic ideas: first trade unions and employers associations as collective interest organizations are granted the right to regulate terms and conditions of employment independently within legally defined limits and secondly, pricing in the labour market must remain free from any state influence.

The autonomy of collective bargaining is constitutionally guaranteed and derives from the freedom of coalition as enshrined in Article 9 III GG. This provision grants individuals and professions the right to establish associations to regulate and improve working conditions including amongst others wages, working time, holidays and to adjust it on a regular basis to socioeconomic conditions by way of concluding collective agreements to bring social peace to the community[211]. In the Lock-out case the BVerfG made clear that the *Tarifautonomie* is distinct from the general freedom of association as enshrined in Article 9 I GG. It stated that[212]:

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[209] see for this Alexy, 2002, 415.

[210] Detlef Radke 1995, The German Social Market Economy- An Option for the Developing and Transforming Countries, 35.

[211] The right of collective bargaining autonomy following from freedom of coalition pursues the purpose lying in the public interest of regulating reasonably and in detail by collective agreements the area of working life that is free from state regulation, in particular to determine the salary for different professions, thereby ultimately bringing social peace to the community, BVerfGE 18,18(1962) in:Michalowski/Woods, 278.

[212] BVerfGE 84 212 [Aussperrung]: "Von der allgemeinen Vereinigungsfreiheit des Art. 9 Abs. 1 GG unterscheidet sich die Koalitionsfreiheit durch die Einbeziehung eines bestimmten Vereinigungszwecks in den grundrechtlichen Schutz. Die Bildung von Vereinigungen zum Zweck der Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen war in der Vergangenheit vom Staat zeitweilig besonders heftig bekämpft worden. Daraus erklärt sich der besondere, über Art. 9 Abs. 1 GG hinausgehende Grundrechtsschutz, den der Zusammenschluß zu solchen Vereinigungen in der sozialstaatlichen Ordnung des Grundgesetzes genießt". For the translation see:
http://www.hrcr.org/safrica/freedom_assoc/84bverfge212.html

"From the general freedom of association of Article 9 I GG the freedom of coalition [of Article 9 III GG] differs in that it includes in the basic right protection a certain purpose of [the right to freedom of] association. The formation of associations with the purpose to safeguard and improve working and economic conditions has been fought against by the state especially strongly at times in the past. This explains the particular basic right protection going beyond Article 9 I GG which [applies] to the formation of such association in the social order of the state".

The autonomy of collective bargaining as such entails different elements[213]. In this regard it must be distinguished between the positive and negative freedom of association. Positive freedom of association refers to the opportunity for employees and employers to become members in coalition organizations, such as trade unions or employers associations, which are able to conclude collective agreements without any state influence. Negative freedom of association refers to the right to decide against joining a trade union and instead to regulate working conditions on an individual basis. The freedom of coalition covers also the freedom to take collective action and the right to strike[214] as a means to bring about a certain degree of equality of bargaining power between workers and employers. The right to strike is counterbalanced by the right of employers' associations to lock out[215].

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[213]Already in its first judgment concerning Article 9(3) GG in 1954 the BVerfG recognized the constitutional status of free collective bargaining for coalition organizations, BVerfG, 18.11.1954 - 1 BvR 629/52, Hutfabrikant case ;In the Co-Determination Case the BVerfG defined the scope of protection offered by the freedom of coalition as follows:' It guarantees the freedom to form associations for the promotion of work and economic conditions and the freedom to pursue these goals jointly (...); in respect of both, the persons concerned should themselves make decisions autonomously, in principle free from state interference. The guarantee refers to the freedom to form, to join, to leave and to stay away from coalitons, it protects the coalition as such and its right to pursue the goals listed in Article 9(3) GG through activities that are specific to coaltions (...). Part of this is the conclusion of collective agreements by the means of which the coalitions regulate, in particular, wages and other financial work conditions in an area in which the state widely refrains from regulations, on their own responsibility and essentially without state influence. BVerfGE 50, 290, Translation: Michalowski/Woods 1999, 284.

[214]BVerfGE 91, 365(1995), Translation: Michalowski/Woods 285: The right of the associations themselves to pursue the purposes listed in Article 9(3) GG by specific activities is protected(...) Article 9(3) GG leaves in principle the choice of the appropriate means for the achievement of this purpose to the coalitions. The basic right protects as activities of coalitions measures of industrial disputes which are directed at the conclusion of collective agreements. They are at least insofar protected by the right to freedom of coalition as they are necessary to safeguard efficient free collective bargaining (...) Part of this is the right to strike.

[215] BVerfGE 84, 212 (1991), Translation: Michalowski/Woods 285: (...) It does not have to be conclusively decided to what extent a lockout in general is constitutionally protected. The protection at leas embraces lockouts (...) which are used with suspensory effect to repel

However the social partners are only allowed to conduct industrial disputes if negotiations and following arbitration procedures were not successful. The right to strike and lockout are mainly based on case law and associated therewith these rights have been shaped over the course of time by judgments of the BVerfG and the BAG(*Federal Labour Court*). These courts are also the main bodies which protect and upheld the *Tarifautonomie*. As the right to freedom of coalition does not have a statutory reservation any limitation needs a legal basis and can only be justified by other fundamental rights or other rights guaranteed by the Basic Law having higher priority. Furthermore, any kind of limitation has to uphold the principle of proportionality[216].

For a long time the German system of industrial relations and associated with that free collective bargaining was rather not subject to state interventions. This has however changed over the course of time. The legislator adopted several legislative acts in the last decades by which an encroachment upon the free collective bargaining took place. This happened mainly to respond to two main developments on the German labour market , namely the high level of unemployment and the decreasing wage level. The latter is related to the fact that the German system of industrial relations has been faced by a process of creeping erosion[217]. The reasons for this process are manifold: the decline in bargaining coverage as well as a in the extension of collective agreements, the trend towards differentiation and decentralisation of collective bargaining through the widespread use of opening clauses in sectoral agreements which allows companies under certain circumstances to go below collectively agreed standards, the

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partial or targeted strikes to establish parity in negotiations. Such lockouts are not generally suitable to impair the establishment of parity in negotiations through the acceptance of industrial action to the disadvantage of the workers.

[216] Buecker/Warneck 2011, Reconciling Fundamental Social Rights and Economic Freedoms after Viking , Laval, Rueffert, 45-101.

[217] Anke Hassel 1999, The Erosion of the German System of Industrial Relations,British Journal of Industrial Relations 1999, pp. 483-505; Otto Jacobi 2003, Renewal of the Collective Bargaining System? In "The Changing Contours of the German Industrial Relations System, ed. Hans Joerg Wietbrecht, Walter Muller Jentsch 2003; Reinhard Bispinck, Heiner Dribbusch ,Thorsten Schulten 2010, German Collective Bargaining in a European Perspective: Continuous Erosion or Re-Stabilisation of Multi-Employer Agreements? WSI Diskussion Paper No. 171, August 2010, http://www.boeckler.de/pdf/p_wsi_diskp_171.pdf; Nicola Duell 2013, Collective wage agreement and minimum wage in Germany, European Employment Observatory 2013 , http://www.eu-employment-observatory.net/resources/reports/1-Germany-NationalAdHocRequestMinimumWage%20-%20final%2005%20Feb2013.pdf

persistently high level of unemployment which shifted the balance of power in favour of employers since the 1990s and in turn weakened the marketplace bargaining power of employees, the trend away from the standard employment relationship towards non -standard forms of employment in the form of temporary agency work, fixed term contracts and marginal part – time jobs, the decline in union membership, the ongoing European integration process with the accession of new Member States in the EU. All these reasons have contributed to the massive expansion of a huge low wage sector in Germany. The traditional actors of the industrial relations system were not able anymore to negotiate fair wages in collective agreements. As a reaction to this development the state has to a certain degree taken over this role by creating and amending legislative acts. This has resulted in the restriction of fundamental rights of the actors in the industrial relations system in Germany. Some of these legislative amendments were brought before the BVerfG which has backed the legislator in its social market economic policies. In the following some of these legislative acts including the relevant judgments of the BVerfG will be analysed. This will make it possible to gain information on the constitutionally allowed scope of state intervention in the autonomy of collective bargaining.

Case 3: The Introduction of Wage Subsidies [218]

In this case the BVerfG had to deal with the question whether the introduction of wage subsidies for the implementation of job creation measures in the German Social Code Part III(*Sozialgesetzbuch III, hereinafter SGB III*) was in compliance with the Basic Law. In 1996 the German legislature introduced in the SGB III wage subsidies applicable for job creation schemes (Arbeitsbeschaffungsmassnahmen). § 275 II 2 in conjunction with § 265 I SGB III entitled the Federal Employment Office to pay wage subsidies for the creation of community service jobs on the second labour market to promote unemployed who were difficult to place in employment. This included particularly jobs to preserve the environment and to improve youth welfare service. The subsidy was only paid out in full if the agreed remuneration did not exceed 80 percent of the standard wages for comparable jobs in the first

[218] BVerfGE 100, 271, Lohnabstandsklausel, [1999];
Government draft: http://dip21.bundestag.de/dip21/btd/14/008/1400873.pdf

labour market. With this measure the legislator aimed to create new jobs in the public service for hard to place unemployed and to integrate them again in the labour market. The metal workers trade union IG Metall claimed that this regulation violated their freedom of coalition resulting from Article 9 III 1 GG and lodged a constitutional complaint to the BVerfG. The IG Metall argued that at the core of the freedom of coalition was the wage setting competence of the social partners, which was also true for the second labour market. The IG Metall further claimed that the legislator was not allowed to intervene in the wage setting mechanism as long as efficient social partners existed. The plaintiff furthermore argued that the regulation weakened her position in collective negotiations, since the legislator had created wage guidelines which would predetermine the result of collective negotiations. If the relevant trade union did not agree with lowered remunerations, the working conditions would not be regulated collectively, but by single contracts. In doing so, the legislator gave incentives to abandon collective agreements and weakened therefore the position of employees.

The Court rejected the constitutional complaint. It found § 275 II SGB III in conjunction with § 265 I SGB III compatible with Art. 9 III GG.

To start with, the Court confirmed that the challenged provisions indeed restricted the plaintiffs freedom of coalition. It stated that the relevant provisions had an indirect impact on the plaintiffs scope of action in the frame of collective negotiations and accepted in so far the plaintiffs claim. However, the Court found the restriction as justified by overriding reasons of the common good. The justification provided was that the freedom of coalition was not an absolute right. It could be limited to safeguard interests of the common good which enjoyed likewise constitutional status. The aim to fight mass unemployment by promoting the creation of new jobs had constitutional status. The Court referred in this respect to the social state principle, Art. 20 (1) GG which obliged the legislator to social balancing. The Court highlighted here again the wide discretion of the legislator to fulfil this obligation. Moreover, the creation of new jobs helped the unemployed to develop their personality, and to have respect for oneself and others. In this regard, the legislator could also invoke Article 1 I GG and Article 2 I GG. The Court stated that public welfare service in times of unemployment was not limited to

passive labour market policy by giving the unemployed financial support. The legislature could also pursue an active labour market policy to increase the number of jobs by co-financing labour costs and to combat in this manner the unemployment. The social state principle lent to such efforts legitimising weight which also justified the limitation of the autonomy of collective bargaining.

The BVerfG then proceeded to state that § 275 III 2 SGB in conjunction with § 265 SGB met all requirements of a detailed proportionality assessment. After acknowledging the suitability and necessity of the Lohnabstandsklausel it went on to discuss the last step of the proportionality test, the proportionality in the narrow sense. As regards this, the Court balanced the interest of the legislature with the interest of the IG Metall. The BVerfG stated that statutory requirements which limited the leeway of the trade unions´ position in wage bargaining were particularly burdensome as the improvement of the working conditions belonged to the domain of the social partners. The BVerfG went on to make clear that wage bargaining on the second labour market was not the same as on the first labour market, due to the fact that remuneration on the second labour market was primarily not paid in return for performed work. The jobs to be created on the second labour market were non- profit oriented and the employer was only given an incentive to hire workers he otherwise would not have hired by receiving the subsidy.. The Court acknowledged that the plaintiff as a trade union could not exercise pressure on the employers´ side by means of threats to strike in the course of collective agreements. This had to do with the fact that employers could refuse to hire the unemployed in the frame of the job creation schemes if this was not in accordance with their interests. The Court then went on to state that there was no equal bargaining position between the social partners on the second labour market. The intensity of the intervention in the wage setting autonomy of the social partners therefore was limited. Employment relationships in job creation schemes on the second labour market were partially complemented by the employment promotion law and the preservation of employees´ interests in the realm of the *Tarifautonomie,* to this extent, was therefore constrained. On the other hand, the Court stated that the argument of the legislator to adopt the relevant provisions weighed

heavily and justified encroaching upon the complainant's right under Article 9 III GG. With a number of 4 million unemployed the creation of jobs was a high-ranking social concern. The Unemployed were often faced with existential threats. The loss of the basis of life could result in a loss of the unemployed's self-esteem and personality. This was particularly the case with long-time unemployed who were difficult to place and had little prospect of finding a job. The BVerfG came to the conclusion that all requirements of the principle of proportionality were met and accordingly the constitutional complaint was not successful.

In this case, the BVerfG classified for the first time the fight against unemployment as a concern of the common good. Associated with that, the Court declared the supply - side oriented active labour market policy of the legislator as constitutionally unobjectionable. As regards this subject, the legislator could invoke the social state principle, human dignity and the freedom of self development to fight unemployment. It is interesting to see that the Court justified the legislator in its intention to fight unemployment by the introduction of statutory wages below standard wages on the basis of the social state principle, which obliges the state and all its organs to promote social justice. The BVerfG gave the fight against unemployment priority over the freedom of coalition of the IG Metall. The scope of free collective bargaining on the second labour market is not the same as on the first labour market. On the second labour market it is constitutionally unobjectionable to make an exceptions from the general principle that wage agreements in the labour market must remain free from any state influence. In this case however, the state, albeit indirectly, has intervened in the wage negotiations. In this regard the Court emphasized the wide discretion of the legislature to fulfill its obligations and stated that it was up to the legislator how he fulfilled this constitutional duty, due to the fact that the social state principle was not further substantiated.

Case 4: The Crediting of Vacation[219]

In this case the BVerfG had to deal with the question whether § 10 I 1of the Federal Leave Act(*Bundesurlaubsgesetz, hereinafter BUrlG*) was compatible with the Basic Law. The parties of the main proceeding disputed whether the defendant was allowed to credit days of the plaintiffs' holidays for the year of 1997. The annual holiday was regulated by an collective agreement. § 10 I 1 BUrlG which was in effect from 1996 till 1998 entitled employers in cases, in which employees due to availed measures of medical precaution or rehabilitation were prevented from work, to credit on the basis of a five-day week the first 2 days on the employee's vacation. The plaintiff in the present case was entitled to annual leave of 30 days. Furthermore, due to a disability he was entitled to additional annual leave of 5 days. The plaintiff availed rehabilitation measures for 15 working days from the 10th June 1997 till 30 June 1997. The defendant credited for this period 6 days on the plaintiffs annual vacation for the year 1997. The plaintiff lodged action for a declaratory judgment to the Labour Court Heilbronn whether he was entitled to 6 days of vacation for the year 1997. The Labour Court Heilbronn had doubts on the constitutionality of § 10 I 1 BUrlG. It stayed the proceedings and referred to the BVerfG the question whether § 10 I 1 BUrlG was in accordance with the Basic Law, in particular with Article 9 III GG. The Labour Court claimed that § 10 I 1 BUrlG provided the employer with the right of disposal over the collectively agreed entitlement to leave. In this way, the employer could unilaterally change elements of a collective agreement negotiated by the social partners.

The BVerfG concluded that § 10 I 1 BUrlG was compatible with Article 9 III GG. The Court first affirmed that § 10 I BUrlG encroached upon the freedom of coalition and the autonomy of collective bargaining of the social partners resulting from Article 9 III GG. § 10 I 1 BUrlG provided the employer with the right of disposal over the collectively agreed entitlement to leave. In this way, the employer could indeed unilaterally change elements of a collective agreement negotiated by the social partners, which would have

[219]BVerfGE 103, 293, Urlaubsanrechnung,[2001].

detrimental effects for trade unions. However, this encroachment was according to the Court justified. The BVerfG reiterated its view and stated that the freedom of coalition, could be limited for concerns of the common good which enjoyed equal constitutional status. The legislator was allowed to intervene in the wage agreements of the social partners. Article 9 III GG entitled social partners with norm setting rights, but not with a norm setting monopoly. The legislator remained authorized to regulate subjects belonging to the field of labour law. As regards this subject, the Court stated that the limitation of the autonomy of collective bargaining within the meaning of Article 9 III GG was in accordance with the Basic Law, if the legislator aimed to protect basic rights of third parties or other issues of constitutional status and the principle of proportionality was respected. The Court made clear that § 10 I BUrlG served interests of the common good. It aimed to contribute to higher levels of employment. The fight against mass unemployment enjoyed according to the Court constitutional status and the legislator could invoke the social state principle, Article 20 (1) GG. The reduction of mass unemployment allowed previously unemployed persons to realize their freedom of occupation, Article 12 I GG, to develop their personality, Article 2 I GG and to have respect for oneself and others, Article 1 I GG. Furthermore, § 10 I 1 BUrlG contributed to the financial sustainability of the social security systems.

The Court considered 10 I 1 BUrlG as proportionate. § 10 I 1 BUrlG was in the point of view of the Court suitable to achieve the pursued objective of the legislator. The Court emphasized the legislators leeway of discretion, stating that it was within the legislators responsibility to decide which measures he took in the public interest on the basis of political visions regarding economic, labour market and socio-political issues. The appraisal of the legislator according to which reduced labour costs contributed to reach a higher level of employment and to reduce costs of the social security system were reasonable. By balancing the interests of the social partners on the one hand, and the legislator on the other, the Court gave priority to the latter. The BVerfG made clear that the autonomy of collective bargaining was concerned in a core area of the social partners. In all branches and bargaining areas holiday entitlements were part of collective agreements

which went beyond the statutory minimum holiday. In this area, the autonomy of collective bargaining gained a greater degree of protection than in subject fields which were not part of collective agreements. Given to this, more stringent requirements had to be applied for justifying the encroachment on the free collective bargaining in the present case. Furthermore, the concrete implications of § 10 I 1 BUrlG on employees had to be taken into consideration. As regards this subject, the Court considered the practical significance of § 10 I 1 BUrlG as rather low, due to its limited scope of application. On the other hand, the Court stated that the fight against unemployment in conjunction with the guarantee of the financial stability of the social security systems constituted a particular important objective. Against the background of the difficult situation on the labour market, the legislator had a large leeway for the realization of its aims.

The line of reasoning of the BVerfG in this case is very similar to the Lohnabstandsklausel case. The Court gave the fight of unemployment as a concern of the common good priority over Article 9 III GG. The Court allowed the legislator to invoke for this objective the social state principle, human dignity and the freedom of self-development. Moreover, the BVerfG also in this case emphasized the wide leeway of the legislators discretion for socio-economic policy making. It is also interesting to see that the BVerfG interprets the freedom of occupation in the present as a positive right, meaning that, the legislator must ensure that fundamental rights holders can make use of their freedom of occupation. It is therefore the task of the legislator to create the necessary conditions for fundamental rights holders to make use of their freedom of occupation.

Case 5: The Temporary Agency Workers Act [220]

In this case the BVerfG had to deal with the question whether the amendment of the Temporary Agency Act(*Arbeitnehmerüberlassungsgesetz hereinafter AÜG*) was in accordance with the Basic Law. In the course of the labour market policy reforms in 2002 the German legislator amended amongst others certain aspects of temporary employment and associated therewith the AÜG. The aim of the so called Hartz reforms was to promote employment. This amendment brought about important innovations for temporary work agencies, temporary workers and clients to the same extend. Among other things, the previously existing restrictions on the duration of assignments to a client were repealed. Furthermore, the ban on synchronization of the period of assignment and the workers employment contract were cancelled which previously authorized temporary agencies to contract out employees for indefinite periods of time. The client was provided with the right to engage agency workers like employees of his own, without becoming his actual employer. Agencies who wished to commercially contract employees to clients for work, were required to obtain a permit from the state authorities. The act furthermore entitled agency workers to the same employment conditions as comparable permanent employees in the client´s business(*equal pay and equal treatment*). Moreover, the AÜG contained an opening clause which allowed the social partners to modify the mandatory requirements of the AÜG by concluding collective agreements. In this way the social partners were given the opportunity to circumvent the principle of equal pay and equal treatment. The amendment of the AÜG was however not uncontested. Accordingly, eight temporary work agencies and two employers' associations lodged constitutional complaints against the AÜG. They claimed that the AÜG violated the freedom of association of the employers` associations, 9 III GG and the freedom of occupation of the temporary agencies., Art. 12 I GG.

The BVerfG dismissed the complaints as inadmissible as they lacked sufficient prospect of success on the merits. In regard of Article 9 III GG , the Court left it open whether there was a restriction of the freedom of

[220] BVerfG, 1 BvR 2283/03, Arbeitnehmerüberlassungsgesetz[2004]; see also Kowanz/Kremp Key Aspects of German Labour Law, 2011, 45.

association, arguing that such a restriction would have been in any case constitutionally unobjectionable. As regards this subject, the Court stated that with the adoption of the AÜG the legislator aimed to protect fundamental rights of third parties and other issues having constitutional status. The contested provisions aimed to improve the situation of temporary workers and associated therewith to protect their freedom of occupation resulting from Article 12 I GG. The regulation of the working conditions provided temporary workers with an adequate level of protection.

The Court went on to state that the objective of the legislator was to increase the acceptance and quality of temporary agency work and consequently to improve agency workers position on the labour market. The relevant provisions of the AÜG guaranteed agency workers a suitable level of protection. The Court stated that individuals had to accept restrictions of their freedom to engage in business activities by labour market regulations which aimed at protecting employees. The establishment of mandatory provisions of labour law in the first place provided the framework within which employees could realize their freedom of occupation.

The Court proceeded to make clear that the relevant provisions of the AÜG served moreover the common good. Temporary agency work served as a bridge from unemployment to employment. The fight against mass unemployment enjoyed constitutional status as it was covered by the social state principle, Article 20(1)GG. The reduction of unemployment allowed the previously unemployed to realize their freedom of occupation.

The BVerfG further held that the AÜG satisfied the requirements of the principle of proportionality. It made clear that the relevant provisions of the AÜG were suitable to contribute to the creation of new employment opportunities. The concept of the legislature to increase the acceptance and quality of temporary agency work was comprehensible. In this regard the BVerfG stated that the legislature had a wide leeway for discretion, meaning that it was within the legislatures' responsibility to decide which measures were to be taken in the public interest and on the basis of political visions regarding economic, labour market and socio-political issues. The relevant provisions of the AÜG were also necessary to achieve the pursued aims, since there was no less severe measure to achieve the same purpose. The

Court also confirmed the proportionality in the narrow sense of the provisions called into question. It stated that although the free collective bargaining was affected in a core area, namely the regulation of the working conditions including the working remuneration, the new regulations did not place an excessive burden on the social partners as the opening clause did not limit the social partners in their field of activity. On the contrary, the opening clause entitled temporary work agencies to organize the working conditions more flexibly.

The Court went on and assessed the constitutionality of the AÜG on the basis of Article 12 I GG. It first stated that the aim of private law arrangements like the AÜG which set limits to the freedom of contract was to balance constitutionally guaranteed interests which were in conflict with each other. The interest of the temporary worker in decent working conditions was in conflict with the interest of the employer in cost effective working conditions. Both interests were protected by Article 12 I GG. The Court made it clear, that especially labour law norms offered protection for employees as they were typically in a structural weak position when an employment contract with the employer was concluded. The legislator was thus confronted with the doctrine of practical concordance. The conflicting fundamental rights needed to be conceived in their interrelatedness and to be limited in such a way that for all those involved they became effective to the farthest extent possible. The Court referred here again to the legislators broad decision making discretion to bring conflicting interests in balance. The BVerfG emphasized that the legislator infringed its duty to protect fundamental rights only, if a fundamental rights position was subordinated to the interests of the other contracting partner in a manner that in consideration of the meaning and range of the affected fundamental right it could not be spoken of an adequate balance anymore. The Court rejected such a subordination and stated that the legislator had fulfilled its duty by considering the conflicting interests appropriately. The relevant provisions did not infringe the freedom of occupation of the temporary work agencies. As regards this, the Court referred to its assessment on the constitutionality of the relevant provisions of the AÜG with Article 9 III GG and concluded that the regulations served a legitimate purpose and were proportionate.

Notwithstanding the Court did not accept the constitutional complaints, this case offers gainful information in terms of the optimization of competing fundamental rights by the principle of proportionality and the doctrine of practical concordance. With the equal pay and equal treatment doctrine the legislator has intervened in the free collective bargaining. This however happened in an unobjectionable way as it can be seen from the judgment of the Court. The encroachment upon the right to free collective bargaining served the interest of the common good.

Case 6: The Collective Agreement Compliance Clause[221]

In this case the BVerfG had to deal with the question whether the collective agreement compliance clause(*Tariftreueerklärung*) in the public procurement law of the *Land* Berlin(Vergabegesetz Berlin, hereinafter VgGB)[222]. was in accordance with the Basic Law. The Land Berlin awarded since 1995 public contracts in the road-building sector on the basis of the VgGB. §1 I 2 VgGB provided that public contracts in the road-building sector were only to be awarded to companies which, when submitting a tender, declared that they pay their employees at least the remuneration prescribed by the collective agreements applicable in the Land Berlin[223]. The Berlin government pursued with the adoption of the Tariftreueerklärung to fight unemployment on the local labour market by giving bidding contractors which paid standard wages protection against disadvantages emerging from competition with contractors not paying such wages. The German Federal Cartel Office (*Bundeskartellamt*) took the view that §1 I 2 VgGB was not in accordance with the German Act Against Restraints of Competition(*Gesetz gegen*

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[221] BVerfGE 116, 202, Tariftreueklausel, [2006].

[222]See for this Bücker/ Warneck, 2011,92.
http://www.eurofound.europa.eu/eiro/2000/01/feature/de0001235f.htm

[223] § 1 of theVergabegesetz Berlin has the following wording: (1)Aufträge von Berliner Vergabestellen im Sinne des § 98 GWB über Bauleistungen sowie über Dienstleistungen bei Gebäuden und Immobilien werden an fachkundige, leistungsfähige und zuverlässige Unternehmen vergeben. Die Vergabe von Bauleistungen sowie von Dienstleistungen bei Gebäuden und Immobilien soll mit der Auflage erfolgen, daß die Unternehmen ihre Arbeitnehmer bei der Ausführung dieser Leistungen nach den jeweils in Berlin geltenden Entgelttarifen entlohnen und dies auch von ihren Nachunternehmern verlangen.
(2) Von der Teilnahme an einem Wettbewerb um einen Bauauftrag oder Dienstleistungsauftrag im Sinne des Absatzes 1 sollen Bewerber bis zu einer Dauer von zwei Jahren ausgeschlossen werden, die ihre Arbeitnehmer entgegen einer Auflage nach Absatz 1 Satz 2 nicht nach den jeweils in Berlin geltenden Entgelttarifen entlohnen.

Wettbewerbsbeschränkungen, hereinafter GWB) and issued a prohibition decision against the Land Berlin. It argued that §1 I 2 VgGB granted the Land Berlin a dominant position on the relevant market which violated the anti-discrimination provision as enshrined in § 20.1 GWB[224]. The Berlin Senate rejected this decision and filed an appeal against the prohibition decision of the German Federal Cartel Office before the Berlin Chamber Court(*Kammergericht*). The appeal was rejected and the case proceeded to the Cartel Senate (*Kartellsenat*) of Federal Supreme Court. The Federal Supreme Court found that linking the allocation of public contracts to the Tariftreueerklärung violated provisions of the GWB and followed in this regard the view of the German Cartel Office and the Berlin Chamber Court. In addition it found that the VgGB was unconstitutional[225], as it encroached on the "negative freedom of association, Article 9 III 1 GG since bidding contractors which wanted to access a market were required to respect collective agreements. The Federal Supreme Court passed the case in the frame of a concrete review(Konkrete Normenkontrolle) of a statute to the BVerfG

The BVerfG found §1 I 2 VgGB as compatible with the Basic Law. The Court rejected the claim that §1 I 2 VgGB interfered in the scope of protection offered by Article 9 III GG concerning the negative freedom of association. As regards this subject the BVerfG stated that the obligation of complying with the duties imposed by § 1 I 2 VgGB did not limit the right of companies to freely decide against joining a coalition.

The Court then went on and assessed the constitutionality of §1.I 2 VgGB on the basis of Article 12 I GG. It stated that the relevant provisions restricted the freedom of occupation, added however, that this restriction was compatible with Article 12 I GG. It concluded that the collective agreement compliance clause encroached upon the free exercise of employment which was guaranteed by Article 12 I GG. This fundamental right contained

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[224] § 20(1) GWB on prohibition of discrimination has the following wording:
Dominant undertakings, associations of competing undertakings within the meaning of §§ 2,3 and 28(1) and undertakings which set retail prices pursuant to § 28(2) or § 30(1) sentence 1, shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification

[225] Decision of the Cartel Senate of the Federal Supreme Court 18. January 2000-KVR 23/98 http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=25566&pos=0&anz=1

amongst others the right to freely negotiate the conditions of the working contract. The Court then made clear, that with the determination of the wage level in the collective compliance clause by the Land legislature, the possibility of employers to negotiate freely with their employees on the wage level was restricted.

The BVerfG went on to state that the encroachment on the fundamental right of freedom of occupation by § 1 I 2 VgGB was justified It made clear that the contested act served to protect employers who paid standard wages in accordance with collective agreements against disadvantages in competition with employers not doing so. The Land legislatures pursued aim to fight unemployment enjoyed constitutional status since it served the public interest. In this regard the legislator could invoke the social state principle, Article 20 I GG. The reduction of unemployment allowed previously unemployed persons to realize their freedom of occupation, Article 12 I GG, develop their personality, Article 2 I 1 GG and to have respect for oneself and others, Article 1 I GG. The reduction of unemployment contributed also to the financial stability of the social security systems. The legislature was also allowed to strengthen the autonomy of collective bargaining by extending the negotiated wage agreements between trade unions and employers to non-members of employers and employees´ associations as this constituted a public interest concern. In this regard the legislator could invoke Article 9 III GG[226].

The BVerfG further held that the procurement law satisfied the requirements of the principle of proportionality. It stated that § 1 I 2 VgG BL was suitable for implementing the legislators pursued aim. In this regard it highlighted the Land legislatures leeway for discretion, stating that it was within the legislators responsibility to decide which measures he took in the public interest on the basis of political visions regarding economic, labour market and socio-political issues. The Court then went on to state that the compliance clause was the least restrictive way of upholding fundamental rights as its consequences were limited to a single contract and to the specific employees engaged in that contract. The relevant provision did also not violate the requirement of the proportionality in the narrow sense.

The BVerfG balanced the interests of the legislature on one hand and the scope of protection offered by the freedom of occupation on the other. It ascertained that the obligation to comply with collective agreements imposed to employers constituted an exertion of influence on the employers freedom of occupation. The right to freely negotiate the content of employment conditions with employees and subcontractors was an essential component of the freedom of occupation, since the economic success of firms was largely determined by the conditions underlying the contract. The intensity of this intervention however diminished due to the fact that the obligation to pay standard wages arose not directly on the basis of a statute but on the decision of the contractor to declare a commitment to pay standard wages in order to win the relevant public procurement contract. On the other hand it held that the fight against unemployment in conjunction with the guarantee of the financial stability of the social security systems constituted a particular important objective. Against the background of the difficult situation on the labour market, the legislator had a large leeway for realizing its aims.

In the present case, the legislator has found it necessary to adopt this law as in the German construction sector undertakings from other EU Member States employed workers with a remuneration below standard wages. Against this background, the main aim of the legislator was to protect German small and medium sized establishments from competition from low wage countries and thus to revive the German labour market. It can be seen that the line of reasoning of the Court in the present case is not different from the reasoning in the previously analyzed cases. The BVerfG gave the fight of unemployment absolute priority. Accordingly, the legislator could also invoke here the social state principle, human dignity and the freedom of self development to intervene in the economy.

4. **The Dual Health Insurance System**[227]

Germany's health care system forms an integral part of the German welfare state and belongs to the core of the social market economy. It has been subject to continuous amendments caused by the legislators will to adapt the

[227] See for this: www.bverfg.de/pressemitteilungen/bvg09-059en.html; Horst Küsters, 2007,44.

system to socioeconomic changes. To begin with, Germany has a dual health insurance system consisting of statutory and private health insurance[228]. One main difference between the former and the latter is the way how the premiums are calculated and associated therewith how the bipartite insurance system is financed. Statutory health insurance is based on income solidarity and risk solidarity as the premiums are not related to individual health risks but to the income of the insured. Private health insurers charge risk related premiums. Individuals pay a premium according to individual risk. This means that people with high health risks like the old, sick and the chronically ill pay high premiums; and people with low health risks pay low premiums. The business model of private health insurance therefore is not based on risk solidarity nor income solidarity. Private health insurance companies are like every other company only profit oriented and associated therewith also market oriented.

The coming into force of the Act to Strengthen Competition in Statutory Health Insurance (Gesetz zur Stärkung des Wettbewerbs in der gesetzlichen Krankenversicherung – GKV- WSG) of 26 March 2007 and the amendment of provisions of the Act for the Reform of Private Insurance Law (Gesetz zur Reform des Vertragsversicherungsrecht- VVG- ReformG) of 23 November 2007 brought about important changes to Germany´s health care system . The aim of the legislator was to ensure that persons either belonging to a statutory or private health insurance have permanent and adequate insurance cover against the risk of illness, especially in situations of social need. Furthermore, the legislator intended to strengthen competition among health insurance providers in regard of the quality of service and economic efficiency and to make it easier to change the insurance company. The GKV- WSG maintained Germany's bipartite health insurance system but it has introduced substantial reforms as of 1 January 2009. This included among other things, a compulsory health insurance, either private or statutory for all persons with a place of residence in Germany. Prior to the reform self-employed and high-income employees were exempt from compulsory insurance. Section 193 (3) of the Insurance Contract

[228] Stefan Greß, Private Health Insurance in Germany: Consequences of a Dual System, 2007, 29-37.

Act(Versicherungsvertragsgesetz) now states that each person with a place of residence in Germany shall be obligated to conclude and maintain with an insurance company licensed to operate in Germany a cost of illness insurance which comprises at least a cost refund for outpatient and inpatient treatment. Furthermore, private insurers are obliged to enter into contract with persons not belonging to the statutory health insurance system. In this regard section 193(5) of the Insurance Contract Act states that private insurers are obliged to grant insurance with the introduction of a so called basic tariff in accordance with section 12 (1a) of the Insurance Supervision Act(Versicherungsaufsichtsgesetz) to all persons with a place of residence in Germany who are not subject to obligatory insurance in statutory health insurance. The conclusion of the insurance contract may not be subject to medical conditions of potential insurance customers and associated therewith a prior medical examination may not be required. The premium for the basic tariff may not exceed the maximum premium under the statutory health insurance scheme(570 Euro) . In the basic tariff, private health insurers are not entitled to terminate insurance contracts nor to charge risk surcharges or to agree to the exclusion of benefits[229]. Furthermore, insurance customers who change to another private insurer will be able to transfer their ageing reserves that form part of their contribution. These provisions were previously retained by the insurer. However, the reform was not uncontested as the case below reveals.

Case 7: The Reform of the Health Insurance System [230]

In this case the BVerfG had to deal with the question whether the relevant provisions of the GKV-WSG, and in particular the provisions relating to the introduction of the basic tariff were compatible with the Basic Law. Five health insurance companies and three complainants with private health insurance lodged constitutional complaints to the BVerfG against provisions of the (GKV- WSG). The companies claimed that several provisions of the reform lead to an unacceptable burden on private health insurance companies and their policyholders, resulting in a violation of their freedom of occupation. In particular, they claimed that the provisions related to the

[229] (§ 203 Abs. 1 Satz 2 VVG).
[230] BVerfGE 123, 186, Gesundheitsreform[2009].

introduction of the basic tariff, namely the obligation to contract, the prohibition to terminate the contract and to charge risk surcharges as well as the exclusion of benefits were in breach of Article 12 I GG.

The Court rejected the constitutional complaint. As regards the provisions concerning the introduction of the basic tariff the Court confirmed that these new regulations restricted the private insurers' freedom of occupation resulting from Article 12 I GG; however it found the restrictions justified. The BVerfG pointed out that the aim of the GKV WSG was to ensure that all inhabitants of Germany had affordable health protection in the statutory or private health insurance system. Accordingly, the health reform served the interest of the common good and the legislator could invoke the social state principle, Article 20 I GG, since the protection of the population against the risk of sickness was a core task of the state. The legislative intention to create health insurance protection for all inhabitants was based upon the aim to offer protection against general risks of life. For this purpose, the legislator was authorized to cover the expenditures originating from it on the basis of a compulsory insurance.

The Court then went on and assessed the proportionality of the relevant provisions. In regard of the proportionality of the introduction of the basic tariff the Court stated that the combination of compulsory insurance (§ 193 Abs. 3 VVG) and obligation to enter into contract(§ 193 Abs. 5 VVG) in the basic category was suitable to achieve the legislators' goal of ensuring adequate and affordable health insurance cover for the category of persons allocated to private health insurance. People were provided with the right to sign an insurance contract and associated therewith obtained health insurance equivalent to the compulsory provision under statutory health insurance. This health insurance was affordable since the premium for the basic tariff must not exceed the maximum premium under the statutory health insurance scheme. The Court also confirmed the necessity of the basic tariff . It argued that the obligation to contract was the least restrictive way to ensure health insurance for people concerned. If there was no obligation to enter into contract, persons with serious pre-existing conditions would have no possibility of being accepted by a private health insurance company due to the increased risk. The obligation to contract was also reasonable since the

goal of the legislature to ensure adequate and affordable health insurance enjoyed high priority.

The Court further stated that in regard of the introduction of a fixed maximum premium in the basic tariff and associated therewith the prohibition of taking into consideration pre- existing conditions of persons concerned for calculating the premium the legislature pursued an legitimate aim, namely to ensure affordable insurance protection for all people concerned in private health insurance. The Court emphasized that there might be cases in which private health insurance companies were obliged to insure people at a non - risk equivalent premium. However, this insufficiency of cover that may arise was not borne by the insurer, but by persons insured in private health insurance, in the form of a contribution. In drafting the act, it was reasonable for the legislature to assume that in the foreseeable future the basic category will have no significant effect on the business of the private insurance companies. The possibility of many insured would move to the basic category was out of question, at all events at present.

The basic tariff entailed a high premium of approximately 570 euros per month. At the same time, the main benefits of the basic category were narrower in scope than the customary benefits of the normal categories. Contrary to the fears of the companies, the legislature was allowed to assume that there would be no disproportionate increases of premium in the normal categories of private health insurance as a result of the need to finance the basic category, whose premiums might not be sufficient to cover costs, and that this would not in future lead to a substantial move to the basic category, which in the long term would destroy the complete business model of private health insurance. The Court stated that if it transpired in future that prognosis of the legislator was mistaken, the legislature would have the duty to correct it.

In regard of the absolute prohibition of termination of comprehensive health insurance policies introduced by the GKV-WSG the Court stated that this was a justified encroachment in order to ensure that the privately insured were covered with a permanent health insurance just as in state health insurance. The same applied to the duty of private health insurers to provide their insured with emergency treatment even in case of default of payment.

This case shows that the rules of the market find only conditional application in the German dual health insurance system, which is traditionally a domain of the state. This has implications for the business model of private insurers, and in particular for their freedom of action. As was shown, the business model of private insurers is neither based on income solidarity nor on risk solidarity. Notwithstanding, private health insurers are now legally obliged to offer a non- risk based basic tariff in health insurance. Health protection is a concern of the common good which enjoys, to the extent illustrated above, priority over the freedom of occupation of private insurance companies. It is again the social state principle which allows the legislature to intervene in the economy and to limit the freedom of occupation of private health insurance companies.

5. Interim Conclusion

This case study illustrated important judgments of the Federal Constitutional Court on the economic constitution of the German Basic Law. It was shown that not all features of the original concept of the social market economy are reflected in legislative acts and associated therewith in the reasoning of the BVerfG. The criterion of market conformity is neither taken into consideration by the legislator when adopting a law nor by the BVerfG in the course of constitutional review. This speaks in favour of distinguishing between the ideal and the real type of the social market economy. The former refers to the original concept of the social market economy and the latter to the social market economy as practised by the legislator in compliance with the economic constitution of the Basic Law. The social market economy facilitated by the Basic Law therefore has a strong social connotation. The state can intervene in the economy in the interest of the common good. In its subsequent case law the BVerfG emphasizes the importance of the concept of man of the Basic Law for the determination of the common good. The concept of man of the Basic Law does not correspond to the self interested "homo oeconomicus" . Accordingly, in the legal reasoning of the BVerfG there is no attachment to market liberalism. The concept of man of the Basic Law has more to do with "the free development of human personality within

the social community". This has implications on the protection of fundamental rights. Fundamental rights holders must accept limitations on their freedom of action which the legislator draws for the care and advancement of communal life. The BVerfG sees the choice and practice of an occupation less as a means of earning a living than as a foundation for the development of the human personality". The BVerfG therefore allows the legislator to intervene in the economy in the name of the common good by invoking human dignity, freedom of self-development very often in conjunction with the social state principle. These constitutional values play an pivotal role in giving social concerns constitutional weight. They constitute to the same time limits of the legislators wide discretion in regulating the social market economy. The BVerfG only ensures that the legislator does not exceed the limits of his discretion.

E. The Social Market Economy and the European Economic Constitution

With the coming into force of the Lisbon Treaty on December 1st 2009, the social market economy has been constitutionalized in the European Union in Article 3 III 2 TEU. This gives on the one hand rise to the question of what legal content the social market economy has and on the other of its legal implications on the Lisbon version of the economic constitution of the European Union. These questions gain in particular significance when considering the judgments of the CJEU in the Viking quartet[231] which were handed down prior to Lisbon. With these rulings the CJEU initiated a debate on the relationship between the economic and social dimension of the EU, thus between the freedom on the market and social state interventions. These rulings are mainly attributable to the substantial content of the European economic constitution in the pre-Lisbon era[232] and associated therewith on the legal reasoning of the CJEU to resolve the conflicting interests. Against this background it will have to be analyzed in how far the constitutionalization of the social market economy offers room for a fairer reconciliation of the economic and the social dimension of the European Union.

1. Defining the European Economic Constitution

The analysis of the European economic constitution necessitates first to draw attention on the status of the European Treaties as a constitution and thus to deal with the term constitution in general terms. A constitution can be generally defined as a "juridical regime that entrenches certain rights in the fundamental laws of the polity, forbids derogation from those rights and enables right holders to sue to protect themselves against state action or inaction that infringes those rights[233]. In addition, there is a distinction between a constitution in the formal and material sense. A constitution in the

[231] Case C-438/05 ITF v Viking Line ABP[2007] ECR I- 10779; Case C – 341/05 Laval v Svenska Byggnadsarbetareförbundet [2007] ECR I – 11767; Case C-346/06 Dirk Rüffert v Land Niedersachsen [2008] ECR I- 1989; Case C-319/06 Commission v Luxembourg [2007] ECR I- 4323.
[232] Filip Dorssemont, A judicial pathway to overcome Laval and Viking, OSE paper series, No 5, September 2011, 2.
[233] Arthurs 2010, 405.

formal sense can be defined as " a set of legal norms contained in a document that is referred as the constitution in social practice[234]**.** The material concept of the constitution seeks to classify certain rules as constitutional according to their typically constitutional content[235] It is generally acknowledged that the EU has no constitution in the formal sense, but a constitution in the material sense. The constitutionalisation of EU law is attributable to the case law of the CJEU.[236] This is particularly remarkable against the background that the word constitution is neither mentioned in the founding Treaties nor in the subsequent amended version of the Treaties. The CJEU made it to a very early point of its jurisdiction clear that the then EEC Treaty was distinct from other international organizations. In 1962, in the *VAN GEND AN LOOS* case the CJEU stated that[237]:

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".

In *Costa vs. Enel* the Court drew more far reaching conclusions from the principles formulated in the Van Gend case. The Court took the opportunity

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[234] See Agustín José Menéndez, Three conceptions of the European Constitution, 2003, p. 5., see also Grimm, Dieter, ' Does Europe need a constitution? in P. Gowan and P. Anderson(eds.) The question of Europe. London: Verso, pp. 239-258; Habermas, Jürgen, Why Europe needs a constitution, in E.O Eriksen, J.E Fossum and A.J Menendez(eds), Developing a Constitution for Europe. London:Routledge, 19-34.; Weiler, Joseph H.H, (2002) ' A constitution for Europe? Some hard choices' , Journal of Common Market Studies, Vol. 40, No. 4, 563-80. ; Bellamy, Richard, ' The European Constitution is dead, long live European constitutionalism' Constellations, Vol 13 No. 2, 2006.

[235] Maria Luisa Fernandez Esteban, The Rule of Law in the European Constitution 1999, 10.

[236] On the constitutionalization of European Union law see inter alia; J.H.H. Weiler, The Constitution of Europe:"Do New Clothes Have an Emperor?" And Other Essays on European Integration, Cambridge, Cambridge University Press 1999; And other Leonard F.M. Besselink, The Notion and Nature of the European Constitution after the Reform Treaty, 2008.

[237] CJEU, Case 6-64 Costa v. Enel[1964] ECR 585.

to lay down general rules which were to govern the relations between Community law and national law:

"[The Treaty]... has created its own legal order... having real powers resulting from a limitation of competence or from a transfer of powers from the States to the Community...[it] would be impossible to assert any internal text whatsoever against the law created by the Treaty without robbing it of its Community nature and without jeopardizing the legal foundation of the Community itself[238].

But it was only in 1986 that the Court explicitly referred to the 'constitution' of the then Community, the EC(EU) Treaty. In *Les Verts* the Court it stated that:

> It must be first emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty[239].

In regard of the particular features of the European constitution the CJEU issued an opinion in 1991 stating that:

> "The EEC Treaty, albeit concluded in the form of international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their national. The essential characteristic of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions"[240].

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[238] CJEU, Case C- 6/64 Costa/ENEL ECR [1964], 1141,1269.
[239] CJEU Case C- 294/83 Les Verts v. Parliament[1986] ECR 1339, para. 23.
[240] CJEU, Opinion 1/91 [1991] ECR I 6079.

Over the course of time the CJEU then made recourse to the constitutional character of the EC(EU) Treaty in subsequent judgments[241], lastly in 2008 in the Case Kadi & Al Barakaat where the Court stated that:

"The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights".[242]

From this statements the legal framework created by the Court which led to the constitutionalization of the Treaties becomes visible, as for instance principles like supremacy, direct effect, enforcement mechanism, the rule of law, hierarchical legal order[243]. These principles have without doubt constitutional character.

As regards the European economic constitution it was already mentioned that the interpretation of the notion economic constitution can be done on the basis of different approaches. The economic constitution in the ideal typical sense corresponds to the ordoliberal understanding of the economic constitution as was shown in the first chapter. The economic constitution understood in a constitutional law sense refers to “the sum of legal constitutional structural elements of the system of economy[244]. At the heart of this reading of the economic constitution is “the use of law to establish controls and limitations of power, a power which can be exerted by the state as well as private protagonists”[245] The economic constitution in the constitutional law sense is based on constitutional provisions with relevance to economic life. In opposition to the economic constitution in the ideal typical sense, the economic constitution in the constitutional law sense, is not a closed system in itself, which necessitates therefore, to consider the whole

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[241] See inter alia CJEU Case C- 2/88 Imm. Zwartveld[1990] ECR I 3365, para. 16; Case C-314/91 Weber v. Parliament [1993] ECR I-1093, para. 8.
[242] Joined cases C- 402/05P and C-415/05P Kadi & Al Barakaat International Foundation v. Council and Commission, judgment of the Court of Justice of the European Communities(Grand Chamber), 3 September 2008;.para 285.
[243] Miguel Poiares Maduro, We The Court, The European Court of Justice and the European Economic Constitution, A Critical Reading of Article 30 of the EC Treaty, 1998, 8.
[244] “ Die Wirtschaftsverfassung ist die Summe der verfassungsrechtlichen Gestaltungselemente der Ordnung der Wirtschaft” Schmidt, Öffentliches Wirtschaftsrecht, 1990, 70, in Armin Hatje 2010, 590,
[245] Armin Hatje, 2010, 590.

constitution when applying and interpreting its provisions. The economic constitution in the constitutional law sense does not necessitate to separate the constitution into an economic and political part like in the ordoliberal economic constitution.

The formula of the economic constitution in the constitutional law sense must be extended when analyzing the European economic constitution. It is necessary to consider the shared competencies between the Union and the Member States in the realm of economic policy which offers room for intervention in the economic process. The European Economic Constitution can therefore be characterized as a mixed constitution which follows from both, market economic guarantees and the economic policy powers of the EU and the Member States.[246]. " In the following, the European economic constitution will be further analyzed.

2. Evolution of the European economic constitution

The system of the European economic constitution was established by the Treaty of Rome and further developed by the several Treaty amendments. In evolutionary terms, the initial conception of the Rome Treaty allowed for a ordoliberal reading of the EEC Treaty. With the advancement of the European integration process, and several Treaty amendments an ordoliberal reading of the European economic constitution is not possible anymore which as a matter of fact necessitates to read the European economic constitution in a constitutional law sense. Departing from the Treaty of Rome the development of the European economic constitution will be illustrated in the next section.

2.1. From Rome to the Single European Act

The tensions between the freedom on the market and social state interventions are no recent phenomena . On the contrary, in the negotiations to the EEC Treaty in 1957, the position of Germany, Belgium, Luxemburg and the Netherlands on the one hand, and France and Italy on the other, differed with regard to the question what form the European integration

[246] Poiares Maduro , We the Court (1998) 160; G. Nicolaysen, Europarecht II (1996), 320, Armin Hatje, The Economic Constitution , p. 594; see also Juli Baquero Cruz, Between Competition and Free Movement, The Economic Constitutional Law of the European Community, 2002, 79.

project should take. Germany advocated a functional method of integration, meaning that a common market had to be developed by the integration of European markets. France, on the other hand, preferred the institutional method of integration which was mainly based on the establishment of a customs union by way of a political integration. These two positions still dominate the regulative controversies in the European Union[247]. At the end it Germany prevailed. The German delegates to the EEC Treaty were amongst others comprised of Walter Hallstein, the first president of the European Commission, Hans von der Groeben, involved in the drafting of the Spaak Report and Alfred Müller-Armack, the founding father of the “Social Market Economy”. These persons were closely related to ordoliberalism. It comes therefore as no surprise that traces of the social market economy can be already found at an early stage of the European integration process. There is historical evidence that the ideas of the Freiburg School played a significant role in drafting the EEC Treaty[248].The Treaty of Rome as the constitutive Treaty of the European Economic Community was therefore mainly economic in nature, which is also the reason why it is considered as the “original” European economic constitution". Article 2 of the EEC Treaty had the following wording:

> "It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States”.

To realize the above mentioned objectives the establishment of a common market was foreseen, consisting of the following instruments: the Customs Union and the fundamental freedoms providing that the Community has the task to eliminate customs duties, non-customs tariffs and obstacles to the free movements of goods, persons, service sand capital; free competition aiming at establishing a system ensuring that competition in the internal market is not distorted; and the introduction of a common trade and

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[247] CLAPHAM, RONALD 1999 , 269.
[248]David J. Gerber Law and Competition in Twentieth Century Europe: Protecting Prometheus 1998,263.

transportation policy. From this it can be inferred that the fundamental market freedoms and the competition rules formed the basic features of the EEC Treaty. The fundamental market freedoms primary aim was to reduce market barriers in transnational trade by the opening up of national markets for supply and demand of goods, persons, and service from all Member States[249]. The openness of markets ensured the right of individuals to conclude contracts across borders. The aim of the establishment of a system ensuring that competition in the internal market is not distorted was to secure the openness of the markets in the then EEC against market limitations and distortions, from privates enterprises or the state[250]. From this it becomes clear that the fundamental market freedoms and the competition law of the EU are interlinked.

To continue with, reference to social policy in the EEC Treaty in its broadest sense was rather vague. As regards this subject it is important to note that the foundation of the then EEC was already laid in 1956 when the Ohlin Report[251] and Spaak Report[252] were produced[253]. Both reports dealt amongst others with the question, to what extent social competencies should be given to the common market with its emphasis on the free movement of products, i.e. goods and services and production factors i.e. labour and capital[254]. The Ohlin Report which was drafted by a group of experts of the International Labour Organization(ILO) and led by Bertil Ohlin in 1956, advocated a transnational harmonization of social policy only in few areas, such as equal pay[255] , but rejected a general harmonization of social policy. By utilizing David Ricardo's economic theory of comparative advantage[256] the

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[249] Hatje 2010, 600.
[250] Hatje 2010, 605.
[251] B. Ohlin, Social Aspects of European Collaboration, ILO Reports and Studies New Series, No.46, ILO, Geneva, 1956:40, see also Catherine Barnard, EU Employment Law, 2012, 4.
[252] Intergovernmental Committee on European Integration. The Brussels Report on the General Common Market June 1956, http://aei.pitt.edu/995/1/Spaak_report.pdf.
[253] See further Barnard EU Employment Law, 2012, 5f.
[254] See further Florian Rödl, Europäische Arbeitsverfassung 2009, 9f.
[255]It was assumed that countries with large differentials of sex will pay lower wages to industries employing to a big extent female employees and those countries will enjoy an advantage in comparison to other countries where differentials according to sex are smaller or non-existent.
[256] " Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by regarding ingenuity and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically: while, by increasing the general mass of productions, it diffuses general benefit, and binds together by

drafters of the Ohlin Report argued that differences in nominal wage costs between countries did not pose obstacles to economic integration because what mattered was unit labour costs. In the report it is stated that, "so long as we confine our attention to international differences in the general level of costs per unit of labour time, we do not consider it necessary or practicable that special measures to harmonise social policies or social conditions should precede or accompany measures to promote greater freedom of international trade" as such differences reflect variations in productivity. This explains why it was not deemed necessary to harmonize social issues. The Spaak Report[257] - drafted by the so called Spaak Committee in 1956 followed broadly the Ohlin Report.

In accordance with the above mentioned Spaak and Ohlin Report but also ordoliberalism, reference to social policy in its broadest sense was rather vague. From the 248 Articles contained in Title III of the Treaty of Rome, "Social Policy**",** only 12 covered social policy issues.[258] At the centre of the social policy provisions was Article 117 EEC Treaty(Article 151 TFEU) which provided:

> "Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained".

This provision clearly reflected the Member States' decision that employment and labour relations were to be determined by the rules of the market and not by European policy formation[259]". Thus, social policy was from the very

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one common tie of interest and intercourse, the universal society of nations throughout the civilized world. It is this principle which determines that wine shall be made in France and Portugal, that corn shall be grown in America and Poland, and that hardware and other goods shall be manufactured in England. (...) To produce the wine in Portugal might require only the labour of 80 men for one year, and to produce the cloth in the same country, might require the labour of men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth". David Ricardo, On the principles of Political Economy and Taxation, 3rd edition, London 182.

[258] see for this Brian Bercussion 2009, 106.

[259]This provision had the following wording: Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.B. Ohlin, Social Aspects of European Collaboration, (ILO Reports and

beginning of the European project subordinated to the economic constitution. Fritz Scharpf characterized the Rome version of the European economic constitution as a project which has decoupled economic and social policy[260]. In the view of Wolfgang Streeck the Treaty of Rome charged the Community with "developing a new kind of social policy, one concerned with market making rather than market correcting, aimed at creating an integrated European labour market and enabling it to function efficiently, rather than with correcting its outcomes in line with political standards of social justice[261]".

It can be clearly seen that the most important rules of the EEC Treaty reflected the constitutive and regulative principles of the ordoliberal economic order and thus supported the ordoliberal reading of the EEC Treaty. To be more precise, the system ensuring that competition in the internal market is not distorted reflects Eucken´s constitutive principle of a workable price system with perfect competition. As regards this subject it is important to note that ordoliberalism had its most powerful influence in the area of the competition rules of the EEC Treaty. This is largely attributable to the primary role of German nationals in establishing and developing the competition law system[262]. The fundamental market freedoms aiming at the opening up of national economies are related to Eucken´s constitutive principle of free access to markets. The control of competition policy was entrusted to the European Commission, as an expert institution independent from democratic politics which reflects the regulative principle of the reduction and control of monopoly power. David Gerber draws attention to the fact that the establishment of the European Commission as a non-political expert institution "contributed to the emphasis on protecting the neutrality and objectivity of decision makers, the establishment of quasi-judicial procedures and standards for decision making, and the general demand that decisions be justified by reference to legal principles rather than merely to political interests"[263]. The effective enforcement of the fundamental market freedoms

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Studies (NewSeries) No.46, ILO, Geneva, 1956) [also, 74 International Labour Review 99 at p.107].

[260]Fritz W. Scharpf 2002, 646.

[261] Wolfgan Streeck, ‚From Market making to State Building? Reflections on the Political Economy of European Social Policy‘ 1996, 399.

[262] Gerber 1995, 49.

[263] Gerber, 1995, 48.

and competition rules deriving from the European economic constitution on national level was ensured by the jurisdiction of the Court of Justice of the European Union (CJEU) when it established the principles of direct effect and the primacy of Community law. Furthermore, the fact that social policy goals had to be achieved through the effectiveness of competition and thus beyond the reach of process policy was also in accordance with the ordoliberal economic constitution. Accordingly, social policy belonged to the sphere of political legislation and had to remain national. The lack of parliamentarism, democracy and pluralism in the EEC Treaty accorded also to the ordoliberal economic constitution.

However, it should not be overlooked that the EEC/EC/EU Treaties ever allowed non market conform interventions in the economy. The Common Agricultural Policy[264], for instance, which forms part in the EU Treaties since the Treaty of Rome, is not based on market principles but it has rather more in common with principles belonging to planned economy. This shows that although the Rome version of the European Economic Constitution generally allowed an ordoliberal reading, exceptions from market principles have been part of the Treaties since the beginning of the European integration process.

The Single European Act from 1987 constituted the first major amendment of the Treaty of Rome and represented the beginning of a profound development, a breakthrough and turning point in the European integration process[265]. The Single European Act was largely based on the Commission´s White Paper named "Completing the Internal Market"[266]. The main objective of the Single European Act was to revitalize European integration by creating the internal market consisting of the free circulation of goods, persons, services and capital to be achieved by 1992. The most important amendment to the EEC Treaty concerned the decision making procedure in the then EEC. Accordingly, the Single European Act made the application of the qualified majority rule for the adoption of legislation acts in several policy fields possible and replaced instead the requirement of unanimousity. This development paved the way for the concept of positive

[264] See Article 38 TFEU.
[265] Joerges, What is Left of the European Economic Constitution? 2003, 14.
[266] Commission of the EC, Commission White Paper to the European Council on Completion of the Internal Market, COM (85) 310 final of 14 June 1985.

integration. As opposed to negative integration which seeks to reduce existing market barriers via the fundamental freedoms, positive integration seeks to introduce new regulatory state policies to correct market failures[267]. There is no doubt, the Single European Act aimed at facilitating positive integration by removing the requirement of unanimity in essential policy areas. However, the White Papers aim was not primarily to encompass market correction measures via positive integration. On the contrary, it was based on eliminating existing transnational trade barriers which could not be removed by negative integration.

The Single European Act constitutes also the beginning of the social dimension of the internal market. The European Commission described the social dimension in the following way:"The social dimension of the internal market is a fundamental component of this project, for it is not only a matter of strengthening economic growth and stepping up the external competitiveness of European undertakings, but also of using more efficiently all the resources available and of achieving a fair share out of the advantages deriving from the single market"[268].Jacque Delors, the then president of the Commission stated that "the creation of a vast economic area, based on the market and business cooperation, is inconceivable - I would say unattainable- without some harmonization of social legislation. Our ultimate aim must be the creation of a European social area[269]. Unsurprisingly, the Single European Act found support by trade the union movement as with Article 118A[270] qualified majority voting concerning social protection and the health and safety of workers was introduced. Furthermore, the introduction of Article 118 B marks the beginning of the social dialogue at EEC level.

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[267] The distinction between negative integration and positive integration goes back to Jan Tinbergen, See Tinbergen1965, 76.

[268] Social Dimension of the Internal Market. Commission Working Paper. SEC (88) 1148 final, 14.9.1988.

[269] EC Bull 2/1986, 12.

[270] Article 118 A had the following wording:

1. Member States shall pay particular attention to encouraging improvements, especially in the working environment , as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made:

2. In order to achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

2.2. From Maastricht to Lisbon

The Maastricht Treaty changed the structure of the Union and associated therewith the European economic constitution fundamentally. This structure can be characterized amongst others as follows: on the one hand a turning away from the pure ordoliberal European economic constitution took place and on the other new ordoliberal elements were added with the creation of the Economic and Monetary Union(EMU). To begin with, for the first time ever a systematic decision in favour of a certain economic system was incorporated in the EC Treaty. With ex. Articles 4(1) and 98 the EC Treaty obliged the Member States and the Community to adapt their economic policies to the model of an open market economy with free competition. This commitment however did not mean that non market conform measures of Member States were generally not allowed[271] as it can be concluded from a judgment of the CJEU dating back to 2000. In *Echirolles Distribution SA v. Association du Dauphine and Others*[272] the Court stated that:

> "As regards Articles 3a, 102a and 103 of the Treaty, which refer to economic policy, the implementation of which must comply with the principle of an open market economy with free competition (Articles 3a and 102a), those provisions do not impose on the Member States clear and unconditional obligations which may be relied on by individuals before the national courts. What is involved is a general principle whose application calls for complex economic assessments which are a matter for the legislature or the national administration"[273].

The Opinion of Advocate General Trstenjak in *In Caja de Ahorros y Monte de Piedad de Madrid*[274] is far more illuminating as far as the justiciability of the open market economy with free competition is concerned. By making reference to the judgment of the CJEU in Echirrolles she stated that:

> "As the Court made clear in that judgment[Echirolles], Articles 4 EC, 98 EC and 99 EC, in so far as they refer to economic policy,

[271] Calliess EUV Kommentar, Article 119, para.9.
[272]CJEU Case C-9/99, Échirolles Distribution SA/Association du Dauphiné and others, [2000].
[273] CJEU Case C -9/99, para 25.
[274] Opinion Advocate General Trstenjak, Case C- 484/08, Caja de Ahorros y Monte de Piedad de Madrid[2009].

> which must conform with the principle of an open market economy with free competition, define only general objectives, with the result that they must be read in conjunction with the provisions of the Treaty designed to implement those objectives. It follows that they are basically in the nature of an economic governance programme. In the view of the Court, they are not therefore provisions that impose on the Member States clear and unconditional obligations which may be relied on by individuals before the national courts. What is involved is, rather, a general principle the application of which calls for complex economic assessments, which are a matter for the legislature or the national administration. The last-mentioned is based not least on the fact that, as there is no common economic policy following the model of the common trade policy or agricultural policy in the framework of the economic and monetary union, the Member States continue to be competent and responsible for their general economic policy, although they must adjust this by way of coordination in such a way as to contribute to the attainment of the objectives of the Community within the meaning of Article 2 EC. In view of the legal uncertainty of those programmes and the continued competence of the Member States in the area of economic policy, it is in principle impossible to assess national implementation measures by use of the yardstick of the abovementioned provisions of primary law as to whether they are compatible with Community law. On the other hand, in accordance with the case-law referred to above, theoretically a legal assessment by reference to the Treaty provisions designed to implement Articles 2 EC, 3(1)(g) EC and 4(1) EC would be possible[275]".

This decision of the Court but also the Opinion of the Advocate General are of utmost importance. It becomes clear that neither a market economic system nor free competition can be directly enforced. The principle of an open market with free competition only constitutes a general objective which as a result must be read in conjunction with the provision of the Treaty

[275] Opinion Advocate General Trstenjak, Case C- 484/08 , paras 65-68.

designed to implement those objectives[276]. The market economic system therefore is a enforceable by the fundamental market freedoms. Undistorted competition is to be enforced by the competition rules in ex. Article 85, 86 EC (now Article 101,102 TFEU).

Notwithstanding that the open market economy with free competition was not justiciable and associated therewith could not be enforced by individuals, it was not meaningless. From a material point of view[277] the systematic decision in favour of an open market economy was significant with regard to the functional conditions of a competition controlled market economy. This comprises economic freedom, the co-ordination of supply and demand in competition and free access and exit from the market. From a structural point of view [278] the establishment of a competition driven market economy prohibits a change of the economic system based on market economic principles . Thus, an introduction of a planned economy by the Community and the Member States was prohibited unless the elimination or limitation of market principles is expressly allowed, as it is the case in agricultural policy. Furthermore, the principle of an open market economy supported a precept of rule and exception in which "each intervention into economic freedom of action was subject to compulsory justification according to the standards of proportionality[279]." Moreover, the principle of an open market economy with free competition served as an guideline for interpretation of economically relevant guarantees and authorisations of the Community´s primary law as well as for the measures of secondary law[280].

With the Treaty of Maastricht the moderate canon of goals of the Treaty of Rome were expanded[281]. Accordingly, Article 2 EC contained 11 primary goals, namely a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance,

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[276] "What gives an economic constitution legal strength and which limits it sets to sovereign and private parties is not derived from a specific economic model but rather from the concrete applied standards of norms". Hatje 2010, 591.
[277]Hatje 2010, 597.
[278]Hatje 2010, 597.
[279]Hatje 2010, 597; Nowak, EuR-Bei, 2011,(21),39; Frenz, GewArch 2010, 330; Louis Azoulai 2008, 1343; Lukas Oberndorfer, 2009, 45.
[280] Hatje 2010, 597.
[281] See for this Barnard , EU Employment Law 2012, 14.

a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among the Member States. These goals were according to Article 3 EC to be achieved mainly by the establishment of the common market and the economic and monetary union(EMU).

In addition, with the Maastricht Treaty a social chapter was introduced . It was originally proposed that Articles 117-122 EEC be amended to expand the EU´s social competence but this idea met with resistance from the UK. In order to secure the UK´s agreement to the Treaty on the European Union as a whole, it was agreed to remove these changes from the main body of the Treaty and place them in a separate Protocol and Agreement(the Social Policy Agreement(SPA) and the Social Policy Protocol(SPP), together referred to as the Social Chapter), which would not apply to the UK. The incorporation of labour law provisions blurred the formerly drawn clear cut line between the European economic constitution and the political responsibility of the Member States in regard of their social policies.

From the standpoint of ordoliberalism the introduction of several non-market elements in the Maastricht Treaty like industrial policy, employment, social and economic cohesion was not in accordance with the ordoliberal economic constitution[282]. This move opened the door for the creation of discretionary policies and new forms and mechanisms for public intervention not compatible with the principle of undistorted competition[283]. Competition policy was downgraded to one among several commitments. As a matter of fact it was not possible anymore to assign the system of undistorted competition a constitutive function and normative dominance[284]. These developments have unambiguously narrowed the scope of derivable rights from the European economic constitution. According to Joerges the Maastricht Treaty was the end of the ordoliberal “economic constitution”[285].

While on the one hand the Maastricht Treaty limited the Rome version of the European economic constitution by allowing non market conform interventions in the market process it widened it on the other hand by the establishment of the Economic and Monetary Union(EMU),. “With its

[282] see for this Craig, 2010, 292.
[283]M.E. Streit and W. Mussler,1995, 5;
[284]Joerges: What is left of the European Economic Constitution? 2004.
[285]Joerges; What is left of the European Economic Constituion? 2004.

provisions on Economic and Monetary Union (EMU), the Treaty of Maastricht added a new layer to the European economic constitution, while leaving intact the constitutional foundation of fundamental market freedoms and competition law. While the first layer of the European economic constitution focuses on the basic principles of microeconomics, the second layer addresses issues of macroeconomics"[286]. And here again, ordoliberalism played a significant role in shaping the rules of the European economic and monetary policy.

With Amsterdam a social policy[287] and employment[288] chapter was integrated in the EC Treaty. The Treaties of Amsterdam and Nice moreover provided for a qualified majority voting in the European Council in areas related to the improvement of the workplace, the protection of health and safety of workers, working conditions, information and consultation of workers, equal treatment of men and women on the labour market and in the workplace, and the integration of people excluded from the labour market [289].

3. **The Lisbon version of the European Economic Constitution**

On December 1, 2009 the Lisbon Treaty entered into force. This Treaty amended the existing legislative framework and precluded a new Treaty on the European Union(TEU) and a Treaty on the Functioning of the European Union(TFEU). Although the main concept of the European Economic Constitution remained unaltered, this new Treaty has provided a new basis to the European integration process. In the following, the components of the Lisbon version of the European economic constitution concerning the microeconomic layer shall be elaborated.

3.1. The Fundamental Market Freedoms

The analysis of the Lisbon version of the European economic constitution has to start with the internal market. Article 3 III 1 TEU states that the Union

[286] Karlo Tuori 2012, 48.
[287] Articles 136-145 EC.
[288] Articles 125-130 EC.
[289] See for this Schömann 2010, 2.

shall establish an internal market. The term internal market is legally defined in Article 26 TFEU[290]. Article 26(1) TFEU states that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. Article 26(2) TFEU then explicitly describes the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. The implementation of the objectives of the internal market is in the first place done by the economic freedoms[291], which traditionally form fundamental pillars of EU Law. The four fundamental market freedoms remained unchanged. Accordingly, the provisions on the free movement of goods are contained in Article 28-37 TFEU, the free movement of persons in Article 45-48 TFEU, the rules on freedom of establishment in Article 49-55 TFEU, the freedom of services is dealt with in Article 57-62 TFEU.

3.2**. European Competition Rules**

Furthermore, the functioning of the internal market is not only ensured by the fundamental market freedoms but also of a system in which competition is not distorted[292]. When taking a look at the Lisbon Treaty, however, one will search in vain a reference to a system ensuring that competition is distorted in the common provisions. Article 3 III 1 TEU contains only the commitment to create an internal market but the system of ensuring undistorted competition is not explicitly mentioned. In comparison, the failed Constitutional Treaty for Europe gave free and undistorted competition the status of an objective of the Union[293]. The removal of a system of undistorted competition from the body of objectives can be traced back to the position of

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290 Ex. Article 14 EC.

291 The ECtHR uses the expression fundamental freedoms as well, however only in regard to rights guaranteed in a catalogue of fundamental rights, whereas in EU Law fundamental freedoms refer to cross-border economic freedoms to establish the internal market, see inter alia, Christian Walter , History and Development of European Fundamental Rights and Fundamental Freedoms § 1(42), in :European Fundamental Rights and Freedoms, ed. Dirk Ehlers 2007.

292 CJEU Case C-300/89 Commission/Council , ECR. 1991, I- 2867 (14.); CJEU Case C-350/92, Spain/Council, ECR 1995, I-1985 (32).

293 Treaty Establishing a Constitution for Europe[2004] OJ C303/1; Article I-3 reads as follows: `The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted`.

the French delegation in the course of negotiations to the Lisbon Treaty[294]. It is important to note that the rules on competition have ever since had a very strong standing in Community law. As was shown before, competition law as a constitutional foundation played a significant role in the European integration process and associated therewith in the rulings of the CJEU. Accordingly, it is worth to mention that the CJEU granted the principle of free competition the status of a general principle of Community law already in 1980[295], thus before it found its place in several provisions of the European constitution with the coming into force of the Maastricht Treaty[296]. Ex. Art. 3(1) g EC foresaw a system ensuring that competition in the internal market is not distorted. This system constituted an important instrument to achieve the objectives enlisted in ex. Article 2 ECT. The significance of this system can also be seen in the rulings of the CJEU when it stated that free competition within the common market constituted a fundamental objective of the Community under ex. Article 3(1)(g) EC Against this background it is very remarkable that there is no commitment to the system that competition is not distorted in the catalogue of objectives of the Lisbon Treaty, Article 3 TEU. This removal however has not the consequence that undistorted competition is completely superseded from the body of objectives. First, according to Article 3(b) TFEU the EU still has the exclusive competence for the establishment of the competition rules necessary for the functioning of the internal market. Furthermore reference to a system of undistorted competition is made in Protocol (No 27) on the internal market and

[294] President Sarkozy stated that:"We have obtained a major reorientation of the objectives of the Union. Competition is no longer an objective of the Union, or an end in itself, but a means to serve the internal market" In French: "Nous avons obtenu une reorientation majeure des objectifs de L'Union. La concurrence n'est plus un objectif de l'Union ou un fin en soi, mais un moyen au service du marché intérieur." See for this Rompuy, 2011, 4.

[295] Case 139/79 Maizena v. Council[1980] ECR 3393; Case 240/83 Procureur de la Republique v Association de defense des bruleurs d´huiles usagees(ADBHU) [1985] ECR 531.

[296] See Article 3(g)EC (...) " a system ensuring that competition in the internal market is not distorted; Article 4(1) EC (...) : " For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States´ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

competition[297]. This protocol enjoys according to Article 51 TEU Treaty status and has the following wording:

(...) ' Considering that the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted, have agreed that: To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 353 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union.'

In the juridical literature it was not quite clear which implications this move would have[298]. In Konkurrensverket v TeliaSonera Sverige AB[299], the CJEU made for the first time reference to Protocol No 27 on the internal market and competition and created clarity on the status of undistorted competition in the frame of the internal market **.** Here, the CJEU declared the following: “Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon, is to include a system ensuring that competition is not distorted". From this it can be concluded that Protocol No 27 is an inseparable part of Article 3(3) TEU. This also means that the excise of the principle of undistorted competition from the front of the Treaties has no direct implications on the enforceability of the European competition rules. But it must be admitted that the shifting of the objective of undistorted competition in a protocol sends a clear political message as the idea of competition has forfeited its legal basis in regard of its function as a *Leitbild* for policy making in the EU.

[297] Protocol (No 27) on the internal market and competition OJ 115 09/05/2008 P.0309-0309.
[298] See for this: Carsten Nowak, EuR-Bei, 2011, (21), 30; Ben van Rompuy, The Impact of the Lisbon Treaty on EU Competition 2011, 4.
[299] CJEU Case C- 52/09 Konkursverket v Telia Sonera Sveriga AB 2001, ECR I-000.

3.3. Defining the Social Market Economy in Article 3 III 2 TEU

As already pointed out, the objective of the open market economy with free competition was to be implemented by the fundamental market freedoms and the European competition rules, the backbones of the Nice version of the European Economic Constitution. One of the most eye catching innovation brought about Lisbon is the shift from an open market economy towards a "social market economy" as an objective of the Union. This begs the question, what the social market economy explicitly stands for. Prima facie, it doesn't seem unreasonable to make recourse to the original concept of the social market economy to define the social market economy in Article 3 III 2 TEU, since the social market economy originated in Germany. On closer examination, however, it becomes cear, that the original concept of the social market economy is not reflected in Article 3 III 2 TEU. As was already pointed out, the notion social market economy can refer to different things. There is a difference between the ideal and the real concept of the social market economy. Even within the ideal concept there are different types of positions, particularly on the scope of the social element within the social market economy. Against the background of the evolution of the European Economic Constitution it seems rather improbable that the social market economy in Article 3 III 2 TEU can be equated with ordoliberalism. It is on the one hand undeniable that the constitutional framework of the Union still has very strong ordoliberal elements. This, however, does not detract from the fact that the Lisbon version of the European economic constitution is with several ordoliberal principles at odds. As was shown, already with the coming into force of the Maastricht Treaty in 1992 non-market elements were introduced which, as a matter of fact, makes it not possible anymore to give the ordoliberal element of undistorted competition a constitutive function. This development is at odds with another basic characteristic of ordoliberalism, namely the requirement of market conformity.

Moreover, it seems also improbable that the social market economy in Article 3 III 2 TEU could be equated with Alfred Müller- Armack´s concept of the social market economy. As was already pointed out, the concept of social market economy combines the freedom on the market with social justice.

Accordingly, it contains distributive and redistributive elements. The principle of freedom on the market provides for a fair distribution of prosperity, and the social policy has the task of redistributing prosperity in cases where the market is not able to guarantee a fair distribution. The necessary means for redistribution policies are funded by public revenue. This is the manner in which the state enforces solidarity by the strong with the weak[300]. However, the European Union lacks competences for creating governmental redistributive policies. The constitutionalization of the social market economy in the Lisbon Treaty did not go hand in hand with a widening of EU competences in the field of social policy allowing for the creation of redistributive policies, as will be shown below. On the contrary, the European Union ever lacked competences to allow the establishment of a European social state. From this it can be concluded that redistribution is still a matter which belongs to the sphere of the Member States. It is particularly this element which makes the social market economy different from an open market economy. Against this background also the predominant view in the German legal literature is that the reference to the social market economy in Article 3 III 2 TEU cannot be equated with it original concept [301]. Exemplary, Joerges states that "central characteristics of the social market economy like redistributive policies through taxation and subsidies, minimum wages, welfare aid, tenant subsidies, investment in higher education, the objective of a high rate of employment are not existing at the EU level. He concludes from this, that the reference to social market economy cannot be equated with its historical model"[302]. For Joerges therefore the reference to a highly competitive social market economy means that a kind of social balancing must take place. According to Azoulai[303] the social market economy refers to the intention to create a social counterbalance to market considerations in the sense that neither the European integration process should be advanced

[300] Friedrun Quaas, Social Balancing, 2008, 393.
[301] Christian Joerges, Rechtsstaat and Social Europe : How a Classical Tension Resurfaces in the European Integration Process, Comparative Sociology 9 (2010) 65-85(74); Matthias Ruffert, Article 3 EUV , Rn.38, in : Calliess/ Ruffert, Kommentar zum EUV/AEUV, 2011, Joerges C./Roedl, F.(2004) in: "Social Market Economy as Europe´s Social Model?" EUI Working Paper No. 2004/8.
[302] Joerges, Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation, German Law Journal 2009, Vol.10 No.4, 336-360(344).
[303] Louis Azoulai, 2008, 1337.

to the detriment of the integrity of the national social systems. For him the social market economy reflects the desire to find a new equilibrium. Catherine Barnard sees things similarly. According to her the highly competitive social market economy refers to the need of reconciling the economic and the social dimension of the internal market.[304] In her point of view the social market economy is equivalent to the German social state principle, Articles 20(1), 28 GG. In the view of DG Employment Comissioner Laszlo Andor the social market economy, that the Treaties support, consists of:"a market economy that harnesses competition to keep prices down and generate growth and innovation, with rules to eliminate distortion; with a social dimension involving the application of rules on working conditions, individual and workers' rights, and the objective of full employment; and displaying a concern for sustainability, illustrated by the idea of balanced growth and the quality of the environment"[305].

All these considerations are in line with the genesis of Article 3 TEU and particular with the objective of the social market economy. As regards this subject, it should be recalled that the constitutionalization of the highly competitive social market economy is not a brand new innovation of the Lisbon Treaty but goes back to an initiative of the former Foreign Ministers of Germany and France Joschka Fischer and Domenique de Villepin respectively in the course of elaborations of the European Convention in 2001[306]. The social market economy in the European Convention was part of deliberations in the working groups on Social Europe and Economic Governance. In the final report of the Working Group XI on Social Europe it is stated that: "several members aimed with the incorporation of the social market economy as an objective to emphasize the link between economic and social development and the efforts made to ensure greater coherence between economic and social policies"[307]. From this it can be clearly seen that the social market economy is targeted at linking the economic and social dimension of the internal market. A reference to the original concept of the social market economy did not take place. This also means that the

[304] Catherine Barnard, European Law Review 2012, 37, 117-135.
[305] http://europa.eu/rapid/press-release_SPEECH-13-251_en.htm.
[306] C. Joerges / Comparative Sociology 9 (2010) 65–85(74); Jürgen Schwarze, EUZW 2004, 136.
[307] CONV 516/1/03 REV 1: 10.

realization of the social market economy must take place beyond the reach of an economic model with undistorted competition and market conformity at its core. Against this background, the highly competitive social market economy has to be defined as the requirement to balance and reconcile the economic and the social dimension of the internal market of the European Union.

3.4.Legal Implications of the Social Market Economy

After having carved out a definition for the social market economy it must be dealt with the question which legal implications the constitutionalization of the social market economy has for the European economic constitution. This necessitates first to analyse the social market economy in its function as an objective of the European Union. The central provision referring to objectives of the European Union is Article 3 TEU. The rationale behind Article 3 TEU is to set out the general objectives of the European Union as an international organisation from which above all the justification of the very existence of the Union can be derived.[308] This is clearly reflected in Article 1 TEU in which it is stated that the establishment of the European Union is based on the conferral of competences by the Member States to attain "common objectives"[309]. The ruling of the CJEU in Echirolles on the enforceability of an open market economy with free competition is mutatis mutandis applicable to the highly competitive social market economy in Article 3 III 2 TEU. This also means that the social market economy is not justiciable and associated therewith can not be enforced by individuals before courts. Moreover, an invocation of Article 352 TFEU is not possible, as this provision necessitates a reference to a policy area, however the sole realization of an objective does not create new competences. The realization of the objective social market economy is, therefore, dependent on single provisions in the Treaties.

Furthermore, Article 3 TEU and associated therewith the objective of the social market economy has no competence establishing nature. This can be clearly concluded from Article 3VI TEU which provides that the Union

[308] Calliess/Rüffert EUV/AEUV Artikel 3 EUV, Rn.4. 2011.
[309]Article 1 TEU has the following wording: " By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union", on which the Member States confer competences to attain objectives they have in common.

shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon the Treaties. Accordingly, this makes it necessary to search for provisions in the Treaties which give the “social” element of the social market economy concrete shape.

Like all objectives of the EU the objective of creating a social market economy is addressed to the institutions of the EU which are enlisted in Article 13 TEU. These institutions are obligated to pursue the objective of creating a highly competitive social market economy legally and factually. Accordingly, Article 3 TEU is a standard setting provision for legislative acts at the European level as well as for the application of respective norms by the EU institutions. Furthermore, the objective of the social market economy is binding on the Member States, which results in positive and negative obligations.[310] In regard of the former Article 4 III 2 TEU states that the Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. In regard of the latter Article 4 III 3 TEU states that the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. From this it can be concluded, that the reference to the social market economy in Article 3 III 2 TEU contains a mandate for action for both the EU institutions and the Member States.

The social market economy places a duty on the EU and the Member States to provide for a balance between the social and economic dimension of the internal market. As regards this the legislatures are endowed with a broad margin of discretion. However, the social market economy does not say anything as to how this task is to be accomplished in detail. The internal market shall be a social one, but the Lisbon Treaty does not indicate what the attribute "social " explicitly stands for. The obligation of the social market economy can be interpreted very differently and therefore the approach to address the "social question " can differ, depending on the political force the legislator belongs to. From this it can be inferred that the objective of the

[310] Calliess/Ruffert, EUV/AEUV, Arti 3, elRn 4, 2011.

social market economy constitutes a political declaration rather than a juridical mechanism.

Moreover, objectives are traditionally used for the interpretation of EU law. The strong position of the fundamental market freedoms and the competition rules are generally attributable to the market economic orientation of the EU. Due to the replacement of the social market economy by the social market economy the CJEU is now required to apply the social market economy in the interpretation of legal provisions in the frame of its case law[311]. Against the background that the strong position of the fundamental market freedoms and the competition rules are amongst others attributable to ex. Art 4 (1) EC which referred to the open market economy, the social market economy can only mean to allow more derogations from the economic constitution as this was before. This possible development gains even more significance, if taking into consideration that the CJEU mainly uses the systematic-teleological approach to interpret EU law, as will be shown below.

4. Interim conclusion

The social market economy according to Article 3 III 2 TEU can neither be equated with ordoliberalism nor with the original concept of the social market economy. The social market economy according to Article 3 III 2 TEU stands for the balancing and reconciliation of the economic and social dimension of the internal market of European Union. In comparison to the open market economy, the social market economy can be distinguished by the fact, that it entails a positive obligation to balance the social and the economic dimension of the internal market. Due to the fact that EU objectives are not enforceable and do not have the effect of establishing a new competence, the social market economy must be read in conjunction with provisions of the Treaty designed to implement it as an objective. The realization of the social market economy depends therefore of competences and enabling provisions in the Treaties. It will be dealt with this in the next section.

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[311] Ingolf Pernice, Potenziale Europäischer Politik nach Lissabon, EuZW 2010, 407, 411; Grabbitz/Hilf, Art. 3 EUV, 51; Walter Frenz / Ehlens C., Europäische Wirtschaftspolitik nach Lissabon, GewArch 2010, 329,330.; Bücker/Warneck 2011,352.

F. Ways to Realize the Objective of the Social Market Economy

The derivable rights from the European economic constitution are not absolute. The CJEU has made it several times clear that both, the internal market and the European competition rules do not form goals in themselves, but rather means to realize higher goals of integration, "which are placed above the economy[312]". Accordingly the derivable rights from the European economic constitution might be limited by social competences and associated with that rights of the EU but also the Member States. This fact is now in particular expressed by the move away from an open market economy with free competition towards a highly competitive "social" market economy which clearly reflects the fact that the EU not only has an economic but a social face. It is worth to stress again, that the social dimension of the internal market is not a brand new development but as such started to evolve with the above mentioned Single European Act. More recently, namely in its Single Market Review Package the Commission stated that the single market has to go hand in hand with social and environment policies to contribute to sustainable development goals and needs to "encompass a strong social and environmental dimension. A major challenge was thus to "find the right mix to allow trade to flourish while respecting labour law, health, safety and environmental standards[313]. Likewise, the European Economic Social Committee is of the opinion that in a social market economy the internal market cannot function properly without a strong social dimension[314]. Also the CJEU acknowledged the social orientation of the EU in its judgment in the Laval case when it stated that:

> It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market' characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, service and capital' but also 'a policy in the social sphere'. Article 2 EC states that the

[312] Opinion 1/91 EEA I [1991] ECR I-6079, para 50; see Armin Hatje 2010, 593.
[313] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, A Single Market for 21st Century Europe Com(2007) 725, 20.11.2007.
[314] OPINION of the European Economic and Social Committee on "The Social Dimension of the Internal Market", SOC/360 The Social Dimension of the Internal Market Brussels, 14 July 2010

> Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'. Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services, and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour".[315]

The question now arises, in how far the constitutionalization of the social market economy will contribute to enhance the social dimension of the internal market in comparison to the pre-Lisbon period. As has been pointed out, the social market economy entails a positive obligation to balance the economic and social dimension of the internal market. The realization of the social market economy in the sense of Article 3 III2 TEU might therefore be achieved in two different ways. First, by enhancing social policy formation on EU level in the sense of positive integration and secondly by limiting the detrimental effects of negative integration for the social models of the Member States. In the following these two options will be examined in detail.

I. The Realisation of the Social Market Economy via the Concept of Positive Integration

The objective of the social market economy in the sense of Article 3 III 2 TEU might be achieved by the concept of positive integration and thus by enhancing active policy formulation. Pursuant to the separation of power and despite the lack of democratic structure of the EU it is in the first place the task of the European legislator to realize objectives of the European Union[316]. The CJEU respects in this regard the political autonomy of evaluation and

[315] CJEU, Viking, para 78-79.
[316] Fritz Scharpf, 2010

formation of the European legislator[317]. In the view of the CJEU, judicial review absolutely precludes the evaluation of the situation resulting from economic facts or circumstances[318]. Accordingly, it is up to the European legislator to adopt new secondary legislation which reflects the idea of the social market economy. The potential significance of the social market economy is that constitutional objectives like the social market economy are intended to guide the policies performed on the basis of given competencies which means that the social market economy is to be taken into consideration when new polices are created. In order to answer the question whether the European legislator is given room to adopt new secondary law in the sense of the social market economy it necessitates first to analyze the new framework and in particular the social competencies of the EU according to the Lisbon Treaty.

1. Social Competences of the European Union

When taking a look at Article 3 TEU what immediately catches the eye are the numerous references to the attribute “social”. Accordingly, the “social” market economy aims to achieve “social” progress, Article 3 III 3 TEU refers to the objective of combating “social” exclusion and the promotion of “social” justice. Article 3 III 4 TEU speaks about the promotion of economic “social” and territorial cohesion. Due to the quantitative predominance of social elements in the body of EU objectives one can quite agree that a textual shift of weight towards enhancing the social dimension of the EU took place. However, the Lisbon Treaty has not extended the social competences of the EU. The many social objectives of Article 3 TEU are not reflected in the competences of the EU. According to Article 4 (2b) TFEU social policy for the aspects defined in Article 3 TFEU belongs to an area where the EU shares its competencies with the Member States. These competences are concretized in the provisions on the social and employment policies, Article 151 -165 TFEU. However, the competences of the EU in the field of social policy have largely remained unaltered. Thus, the social competences of the Union are still very limited. The Lisbon Treaty moreover did not change the

[317]Hatje 2010, 593.
[318] CJEU Case C- 233/94 Germany vs. Parliament and Council [1997] ECR I-240. Para 55.

decision making process in the social policy area and accordingly the unanimity requirement remained unaltered. The European Council has still to act by unanimity as laid down in Articles 153 and 294 TFEU for matters relating to social security and the social protection of workers, termination of employment contracts, collective representation and defense of workers´ and employers´ interests, conditions of employment for their country national with legal residency in the territory of the Union, and financial contributions for employment promotion and job creation. The European Council moreover has still no competence in matters of pay, the right of association, the right to strike or the right to impose lock-outs. Furthermore, the Lisbon Treaty does not contain provisions for qualified majority voting to become normal procedure for matters of social policy. As a consequence, the unanimity rule remains in place for all decisions relating to social protection[319]. It can be inferred from this, that the probability of adopting new legislative acts in the sense of the social market economy according to Article 3 III 2 TEU appears to be rather low.

2. Social Novelties of the Lisbon Treaty

Notwithstanding and against the background of structural changes to the European Constitution brought about by the Lisbon Treaty there are novelties which are of significance for the social dimension of the internal market of the EU. Accordingly there are three developments which needs further clarification. First, the introduction of values of the European Union in Article 2 TEU and in the preamble of the CFREU, secondly the legally binding fundamental rights in the frame of the CFREU, and lastly the so called horizontal social clause in Article 9 TFEU[320]. Against the background of the unchanged competences of the EU in economic and social issues, the question which now must be addressed is whether these novelties have the potential to result in a fairer reconciliation of the economic and social dimension of the internal market of the EU. It will be dealt with these issues in detail in the next section.

[319] Schömann, 2010, 2.
[320] See for this, Lörcher 2012, 181.

2.1. The Values of the European Union

At the forefront of the catalogue of objectives in Article 3 I TEU it is stated that the Union´s aim is to promote peace, its values and the well-being of its people. The European values are enlisted in Article 2 TEU and in the Preamble to the CFREU. Article 2 TEU which is identical with Article 2 of the failed Constitutional Treaty has the following wording:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights, including the rights of persons belonging to minorities. These values are common for Member States in a society in which pluralism, non- discrimination, tolerance, justice, solidarity and equality between women and men prevail"

The preamble of CFREU makes reference to European values as follows:

> " (...) the Union is founded on the indivisible , universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law".

Generally speaking, values[321] are defined as concepts or standards that people have about what is good and bad, i.e. abstract standards of goodness, moral principles or ideals[322] and as such they are considered worthwhile or desirable[323]. From a legal perspective, values describe the "assets recognized by a legal system as given or compulsory"[324] . "Legal and social values are often associated with goals and purposes- they establish a direction for policymaking and may place demands and limitations on state

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[321] The Oxford English Dictionary describes values as follows: „[p]rinciples or moral standards of a person or social group; the generally accepted or personally held judgment of what is valuable and important in life; The quality of a thing considered in respect of its ability to serve a specified purpose or cause an effect."; Oxford English Dictionary 3500 (5th ed. 2003)

[322] Chris Longman, The Debate on European Values, 187, in: Constitutional Politics in the European Union- The Convention Moment and its aftermath.

[323] Neomi Rao, The Columbia Journal of European Law 2008, Volume 14 No.2, p. 222.

[324] Chrsitian Calliess, The Transnationalization of Values by the European Law, 2009, 13

action. Broadly phrased values rarely require specific actions, but they serve as guidelines or goals to be met either by individuals or the state"[325].

The European Treaties ever since contained objectives, given the fact that international organizations like the European Union necessitate objectives to justify their existence. The same however, holds not to be true for values, which gained legally binding status only after Lisbon. However, looking back at the history of the European integration process and leaving for the moment aside the normative implications of values, it can be seen that values have always played a role in the EEC/EC/EU and accordingly have always been debated. The Treaty of Rome, although not explicitly referring to values, committed the then EEC amongst others to social progress, solidarity and the preservation of peace and liberty. In 1973 at the Copenhagen European Summit the then nine Member States of the EEC produced a 'Declaration on European identity' in which they expressed their 'wish to ensure that the cherished values of their legal, political and moral order are respected' and that the 'attachment to common values give the European identity its originality and own dynamism[326]. Two decades later then the Maastricht Treaty of 1992 made in ex. Article 6 TEU reference to principles. These principles included amongst others liberty, democracy, respect for human rights, fundamental freedoms, the rule of law, social rights, solidarity, social progress, sustainable development, peace and security[327]. The foundations for the debate on values in the drafting process of the Constitutional Treaty were laid in 2000 at the Charter Convention which resulted in the adoption of the CFREU. The Constitutional Treaty referred to values which were already mentioned in the Preamble of the former TEU. Furthermore, the Constitutional Treaty and the Lisbon Treaty innovate by adding other values. These are respect for human dignity, equality and respect for the rule of law. On closer examination and against the background of its paramount importance, the incorporation of values raises questions which will be addressed in the following.

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[325] Neomi Rao, 2008, 222.
[326] Declaration on European Identity, Bulletin of the European Communities, No. 12, December 1973, 118-122.
[327] See Preamble of the Treaty of Maastricht, ex. Article 6 TEU.

2.1.1. Values in Article 2 TEU

Article 2 TEU is the main provision referring to the values of the EU. On closer inspection it becomes clear that there is a difference between Article 2(1) and Article 2(2) TEU. While Article 2(1) TEU contains values on which the European Union is explicitly founded, Article 2(2) TEU as a so called homogenity principle refers to characteristics which are used to describe the qualities of a civilised society common to the Member States[328]. Moreover, Article 2(1) TEU has in comparison to Article 2(2) TEU legal implications as can be concluded from the explanatory notes as regards Article 2 TEU in the European Convent. In CONV 528/03 it is stated that:

(...) This Article concentrates on the essentials – a short list of fundamental European values. Further justification for this is that a manifest risk of serious breach of one of those values by a Member State would be sufficient to initiate the procedure for alerting and sanctioning the Member State (see Article 45 of the preliminary draft Treaty which would incorporate the mechanism set out in Article 7 TEU), even if the breach took place in the field of the Member State's autonomous action (not affected by Union law). This Article can thus only contain a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practicing tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting there from which are subject to sanction. That does not, of course, prevent the Constitution from mentioning additional, more detailed elements which are part of the Union's "ethic" in other places, such as, for instance, in the Preamble, in Article 3 on the general objectives of the Union, in the Charter of Fundamental Rights in Title VI on "The democratic life of the Union" and in the provisions enshrining the specific objectives of the various policies[329].

From this it can be concluded that there are three reasons for enshrining values in the European Constitution, namely to make the people of Europe feel part of the same Union**,** to provide criteria to assess whether applicant

[328] Dorssemont 2012, 48, Blanke, Mangiameli
[329] CONV 528/03, p. 11.

states are worthy of accession; and to provide criteria for suspension or sanctioning of Member States in breach of these values. As regards the second reason, Article 49 TEU[330] states that only European states which respect the values referred to in Article 2 TEU and commit themselves to promote them may apply to become Member of the EU[331]. In regard of the third reason, Article 7 TEU[332] contains an alerting and sanctioning system which finds application in cases where there are risks of serious breaches of EU values by Member States, This includes even breaches in the field of the Member State´s autonomous action[333]. In both provisions, Article 7 and 49 TEU the term value is only related to the "hard core values" of Article 2 I TEU but not to the 'characteristics' enlisted in Article 2 II TEU. According to Article 2 TEU solidarity would not count as a value, but only as a feature. The non-classification of solidarity as a value, however, would not reflect the European Constitution properly. The explanatory note correctly provides that European values may be mentioned in other places than Article 2 I TEU. It makes explicitly reference to the CFREU, where solidarity is enlisted as a value in the Preamble of the CFREU as was shown before. As a matter of fact, solidarity belongs without doubt to the European values[334].

The incorporation of values in the TEU has further legal consequences[335]. This follows from the fact that the EU is obliged to promote these values as they belong to the normative framework of the EU. As

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330 Article 49(1) TEU reads as follows: Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.

331 Chris Longman, The Debate on European Values, 187, in: Constitutional Politics in the European Union- The Convention Moment and its aftermath.

332 Article 7 I TEU has the following wording: 1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
Article 7 III TEU reads as follows: Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

333 CONV 528/03.

334 Dorssemont, Values and Objectives, 2012, 48.

335 See Von Bogdandy

Mangiamelli rightly states the “inclusion of values into a legislative or constitutional act produces the effect to make them legal. So, once inserted in a legal text, these values become “principles” that can be interpreted and help create a system”[336]. According to Article 19 I 2 TEU the CJEU shall ensure that in the interpretation and application of the Treaties the law is observed. This task also includes the interpretation and application of Article 2 TEU. Furthermore, Article 13(1) TEU states amongst others that the Union shall have an institutional framework which shall aim to promote its values. This means that also the other institutions of the EU are obliged to promote the core values of Article 2 TEU.

2.1.2.The Relationship of Values and Objectives

From the wording of Article 3 I 1 TEU it becomes furthermore clear that Articles 2 and 3 TEU are interlinked. The fundamental difference between these two Articles is that the former enshrines the basic values which make the peoples of Europe feel part of the same "Union", whereas the latter sets out the main aims justifying the creation of the Union for the exercise of certain powers in common at European level[337]. “The strategic role of values is to guide the Union´s legal and economic planning with regard to its objectives”[338].The values of the EU are linked with the issue of citizenship, whereas the objectives are related to the Union[339]. It becomes obvious that the objectives of the European Union must be realized in the light of the values of the European Union. Objectives are therefore means to the end for promoting the values of the EU. Accordingly values enjoy priority over objectives which results in the fact that the former constitutes a limit on the EU objectives and the exercise of its powers[340].

Although the CFREU has indeed upgraded some fundamental economic freedoms to the status of fundamental rights a distinction could be made between human rights within the meaning of Article 2 TEU and fundamental rights within the meaning of the CFREU. In sum, in interpreting EU Directives in the area of social policy the Court should take account of the constitutional

336 Mangiameli in Blanke nachschauen
337 CONV 528/03, p. 12.
338 Bruno Veneziani, The Lisbon Treaty and Social Europe, 2012, 124.
339 Dorssemont, Values and Objectives, 2012, 50.
340 Dorssemont, Values and Objectives, 2012, 50.

values underlying these instruments, instead of interpreting them in the light of the conflicting economic objectives of the European Union. It is right to say that Article 3 TEU is inseparably linked to Article 2 TEU. This implies that every time the Union is taking action it must take into consideration both, the values and the objectives of the European Union. With the coming into force of the Lisbon Treaty values have gained significance from a normative point of view. The Lisbon Treaty gave the European Union a new telos which has particularly implications for the interpretation of EU law. The explicit incorporation of values in the Treaties illustrates very clearly the further development of the European Union from an economic community (*Wirtschaftsgemeinschaft*) towards a value based community (*Wertegemeinschaft*). It is the people of the Union who have moved at the center of the European integration process, not as market participants but as citizens of the European Union. This development is further reflected by the incorporation of values in several other provisions of the Treaties. Article 3 V TEU states that in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. In Article 8(1) TEU it is stated that the Union shall develop a special relationship with neighboring countries, aiming to establish an area of prosperity and good neighborliness, *founded on the values of the Union* and characterized by close and peaceful relations based on cooperation. Article 13(1) TEU provides that the Union shall have an institutional framework which aims to promote its values and advance its objectives. Article 21(2) a TEU states that the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to safeguard its values. Article 32 TEU provides that Member States shall ensure, through the convergence of their action, that the Union is able to assert its interests and values on the international scene.

2.1.3.Values in the CFREU

An analysis of the values of the European Union necessitates to take into consideration of the CFREU. It is the CFREU in which for the first time in the history of the EU values explicitly found mentioning. Due to this it comes as

no surprise that the values in Article 2 TEU and the CFREU are largely identical. As stated above, solidarity in the frame of the CFREU is a value and not only a feature. Furthermore, Article 2 TEU stresses the value of respect for human rights, whereas the CFREU contains a catalogue of fundamental rights. The values of Article 2 TEU are linked to the values in the CFREU. The CFREU as such entails with the fundamental rights concretizations of the Union´s values. Thus, for interpretation purposes of the values it can re resorted to the specific provisions of the CFREU. The difference between the values in the TEU and the CFREU is the scope of application. Values of the CFREU are only applicable for Member States if they implement EU Law. The values of the TEU on the other hand must always be respected. Furthermore, the sanctioning procedure resulting from Article 7 TEU is not applicable to the CFREU.

The incorporation of values in the Lisbon Treaty has far reaching legal implications. This means for the social market economy in Article 3 III 2 TEU that the "free market principle finds its limit in the principles of solidarity and respect for human dignity and human rights"[341]. These social values are in particular concretized and reflected in the CFREU but also in human rights instruments belonging to the domain of the Council of Europe. This necessitates to further analyze the protection of fundamental social rights in the European multilevel governance system.

2.2. Fundamental Social Rights in the European Multilevel Governance System

In the European multi-level governance system the protection of fundamental social rights consists of mutually dependent and interacting orders that together form one encompassing constitutional order. With the coming into force of the Lisbon Treaty this order is constituted by three layers, namely the Charter of Fundamental Rights of the European Union(CFREU), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – once the EU has acceded to it – and fundamental rights

[341] Roberto Nazzini, 2011, 117.

as general principles of law[342]. The CFREU has finally become legally binding[343] and has according to Article 6 I TEU the same legal value as the Treaties. Thus ,other than before, the CFREU stands on an equal footing with the provisions belonging to the TEU and TFEU, in particular with the fundamental market freedoms. This is probably the Lisbon Treaty´s most significant innovation in regard of the EU´s social dimension.

2.1.1. Fundamental Social Rights in the CFREU

The protection of fundamental rights in the CFREU in itself takes place on the basis of CFREU provisions, international conventions such as the ECHR, the European Social Charter (ESC)[344] and the Revised European Social Charter (RESC)[345], fundamental rights as they result from the constitutional traditions common to Member States and international legal instruments to which the Member States and the EU are signatories. According to Article 51(1) CFREU the provisions of the CFREU are addressed to EU institutions and to Member States only when they implement EU law or act within the scope of EU law. Conversely, this means that internal situations are not included within the scope of the CFREU. This gap is then filled by national constitutional norms. It is not exactly clear what the terms "implementing Union law means". First of all, there is no doubt that the CFREU finds application in the so called "agent situation" in which Member States adopt measures in order to comply with the obligations imposed by a normative scheme set out by EU law. However it is not quite clear whether the CFREU is also applicable in the so called derogation situation in which the validity of national measures derogating from EU requirements are examined[346]. Koen Lenaerts affirms the applicability. He refers to the application of fundamental rights as general principles of EU

342 See for this, Clemens Ladenburger, FIDE 2012- Session on Protection of Fundamental Rights post-Lisbon- The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions, Brussels 2012

343 For the history of fundamental rights in the EU see: Brian Bercussion, European Labour Law and the EU Charter of Fundamental Rights, 2006; Kollonay-Leboczky, Lörcher, Schömann, The Lisbon Treaty and the Charter of Fundamental Rights of the European Union, 61-104 in: The Lisbon Treaty and Social Europe 2012

344 European Social Charter, 18.10.1961, ECTS 1961, No.35.

345 European Social Charter(Revised), 3.5.1996, ECTS No. 163.

346 Koen Lennarts, European Cosntitutional Law Review 2012 , 381.

law[347] in such situations and particular to the judgment of the CJEU in ERT[348]. Here Court stated that national rules which constitute a restriction on the freedom to provide services may be justified on the grounds laid down in Article 52(1) TFEU, in so far as those rules are "interpreted in light of[…] fundamental rights". In order for those rules to fall within the scope of Article 52(1) TFEU, they must be compatible with the fundamental rights the observance of which the CJEU ensures. It follows from that, when a Member State derogates from the substantive law of the EU, it is also implementing EU law, given that such derogations must always meet the conditions imposed by EU law. Not only must the national measure conflicting with the fundamental freedoms pursue a legitimate interest recognized by EU law, be free from any discrimination, and respect the principle of proportionality, but it must also comply with fundamental rights. ERT suggests that whether the derogations put forward by a Member State comply with fundamental rights is a determination that does not fall outside the scope of application of the treaties. Far from that, all derogations put forward by a member state must always pass muster under the EU law, of which the Charter is now part and parcel. The CJEU has so far not addressed this question and thus, has not provided clarification on the way how "implementing Union law" must be interpreted.

To continue, the CFREU has also no potential effect on the application of EU fundamental social rights with regard to legal proceedings between private parties. This is due to the fact that the CFREU was drafted primarily to govern vertical relationships rather than horizontal ones. The vertical effect of fundamental rights refers to the applicability of fundamental rights in protecting individuals against the EU or Member States. Horizontal effect refers to the ability of fundamental rights to affect legal relations between

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347 General principles of EU law fulfil a threefold function. First, they authorize the CJEU to close loopholes left either by the EU legislature or the authors of the Treaties. This function safeguards the autonomy and coherence of the legal system of the EU. Secondly, general principles serve as interpretation tools, as both EU law and national law falling within the scope of EU law must be interpreted in line with general principles. Last but not least, they may be relied upon as grounds for judicial review .EU legislation in non- compliance with general principles must be considered as void. National law falling under the scope of EU law that violates a general principle must not be applied, The constitutional allocation of powers and general principles of EU law , Koen Lenaerts, Jose Guiterrez Fons, Common Market Law Review 47: 1629-1669(1629).

348 CJEU, Case C- 260/89 ERT.

private parties. The horizontal effect of fundamental social rights at EU level has to be seen in relation to the right to non-discrimination[349] and equal treatment. In Mangold[350] and Kücükdeveci[351] the CJEU gave only the right to non-discrimination and equal treatment horizontal effect by construing it as a general principle of primary EU law. General principles of law belonging to the EU's 'old method' of protecting fundamental rights have to be distinguished from the classification of provisions made in the preamble in the CFREU on rights and freedoms, on one hand, and principles, on the other. It follows from Article 51(1) CFREU that subjective rights must be respected, whereas principles must be observed. The difference between rights and freedoms on the one hand and principles on the other is "evidence of a graduated intensity of protection according to the legal right concerned"[352]. Principles may be implemented by the legislator and they become significant for courts only when the implemented acts needed to be interpreted or reviewed. They do not give rise to direct claims for positive action. This distinction is of the utmost importance for the fundamental social rights in the CFREU. Chapter IV (Articles 27-38) of the Charter is entitled Solidarity. Articles 27 to 34[353] refer directly on industrial relations and employment. The great majority of fundamental social rights under the heading solidarity are rather principles than justiciable rights. This has the consequence that fundamental social rights are deprived of their legal significance[354] as they constitute rather programmatic obligations than enforceable subjective rights. In some cases, however, it is fairly difficult to make a distinction between rights and principles, since some provisions of the CFREU may contain elements of both a right and a principle, for example, Articles 23, 33 and 34 CFREU. The task of identifying whether a provision is a principle rather than a right is left to the interpretation of the CJEU, which has not yet addressed the issue. However, there is no doubt

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349 Article 21(1) CFREU states that "any discrimination based on... age...shall be prohibited".
350 CJEU C-144/04 (Mangold v. Helm).
351 CJEU C-555/07(Seda Kücükdeveci v. Swedex GmbH & Co. KG).
352 Opinion Advocate General Trstenjak, Case C- 282/10 Maribel Dominguez, 2011, para. 71.
353 Workers rights to information and consultation(Article 27), Right to collective bargaining and collective action(Article 28), Right of access to placement services(Article 29), Protection in the event of unjustified dismissal(Article 30), Fair and just working conditions(Article 31), Prohibition of child labour and protection of young people at work(Article 32), Family and professional life(Article 33) Social security and social assistance(Article 34).
354 Karlo Tuuori, The Economic Constitution among European Constitutions, 2011, 37.

that the right of collective bargaining and action, Article 28 CFREU, the right of access to placement services, Article 29 and the right to just and fair working conditions Article 31 CFREU grant subjective rights[355].

The CFREU also does not widen the competencies of the EU[356]. This becomes clear from Article 6(1) TEU which states that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. According to Article 51(2) CFREU does the Charter not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

There is no doubt, the CFREU has an added value for the fundamental social rights protection in the EU. However, the significance of the Charter for the protection of fundamental social rights is weakened by the fact that the Charter only has a narrow scope of application. As regards this subject, the fundamental rights as general principles of EU law offer a higher level of protection. From Article 6 I and III TEU it can be concluded that the CFREU and the general principles of law have a separate existence. Both, the rights under the Charter and the rights under general principles have equal status. In addition, the fact that the majority of the social rights are considered as mere principles weakens the protection of fundamental social rights in the CFREU. Another shortcoming of the CFREU is that the EU cannot guarantee the precondition for exercising social rights. This is so because the competency to regulate social policy matters still remains with the Member States[357].

2.2.2. Fundamental Social Rights in the Council of Europe

There are other human rights instruments referred to in the CFREU itself that are of relevance for the protection of fundamental social rights. Two of these instruments can be found within the domain of the Council of

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[355] See Opinion Advocate General Trstenjak, Case C- 282/10 Maribel Dominguez, 2011, para. 78-79.
[356] See further Barnard, European Labour Law 2012, p. 31.
[357] See for this Monika Schlachter, Reconciliation between fundamental social rigths and economic freedoms, 2011, 5.

Europe, namely the ESC[358] and the (R)ESC[359], on one hand, and the ECHR, on the other. Both instruments are linked to the CFREU. The European Social Charters from the Council of Europe play a significant role in the frame of the CFREU. By establishing a regional European system for the protection of social and economic human rights, the Social Charters complement the ECHR, which guarantees civil and political human rights. The ESC and RESC have legally binding character at Member State level. These instruments are important for developing fundamental social rights in the EU, not least because the CFREU explicitly refers to the ESC and RESC in its preamble, making them integral instruments for interpreting relevant provisions of the CFREU. It should also be recalled that that there is a reference to the ESC in the fifth recital of the TEU as well in Article 151(1) TFEU. Moreover, numerous fundamental social rights particularly in the solidarity chapter of the CFREU are materially based on rights of the European Social Charters[360].“ In its case law, the CJEU has acknowledged the European Social Charter as one of the sources of the common European tradition which defines fundamental rights general legal principles, but the CJEU has been reluctant to refer on a provision of this Charter in its rulings (or the solidarity provisions in the EU Charter of Fundamental Rights”[361].

The ECHR forms another layer for the protection of social fundamental rights in the EU. Although the ECHR is not set up specifically to promote social justice, there is wide scope for protecting economic and social rights under the ECHR system, above all in respect of private and family life, freedom of association, including the right to strike, and the prohibition of discrimination[362]. The European Court of Human Rights (ECtHR) treats the ECHR as a ‘living instrument’ and accordingly has developed a new

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358 The European Social Charter was adopted in 1961. The Member States declared, that they are resolved to "make every effort to improve the standard of living and to promote the social well-well being of both their urban and ruralpopulations". ETS No 035; see for this also Christian Walter , 2007, 10.

359 The European Social Charter has been complemented by Additional Protocols. In 1996, these additions were combined in a revised European Social Charter, which came into force on 1 July 1999.

360 See Explanations relating to the Charter of Fundamental Rights of the European Union OJE 2007/C 303/02.

361 Kaarlo Tuori , The Economic Constitution among European Constitutions, 2011, 37.

362 Angelika Nußberger, 2012, 12.

methodology to interpret rights contained in the ECHR[363]. In the cases *Demir and Baykara*[364] and *Enerji Yapi Yol Sen* v *Turkey*[365] the ECtHR defined the substance and content of Article 11 ECHR concerning freedom of association also on the basis of elements of international law other than that of the Convention, namely the ESC, the RESC and the ILO Conventions. The ECtHR stated that although Member States are free to develop their own systems, all such systems must be consistent with international labour standards, irrespective of whether or not the Member States have ratified the relevant Convention. This dynamic approach is of the utmost importance for the development of fundamental social rights protection in the EU since the ECHR forms an important layer of fundamental rights protection. In case of accession, the CJEU will be requested to interpret legal standards in accordance with the interpretation of the ECtHR. This in turn would result in the fact that not only the ECHR, but also the ESC, the RESC and the ILO Conventions might influence the interpretation of EU secondary law.

2.3. The Horizontal Social Clause[366]

A further innovation of the Lisbon Treaty is the so called horizontal social clause, enshrined in Article 9 TFEU. This article has the following wording:

> In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

The horizontal social clause is a new provision of the Lisbon Treaty and as such taken over verbatim from Article 117 of the failed Constitutional Treaty. It belongs in the frame of the TFEU to " Provisions having General Application". The aim of these provisions is to ensure consistency between

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363 See for this ECtHR Tyrer(1979-1980) 2 EHRR 1, para 31.
364 ECtHR, Demir and Baykara, no. 34503/97.
365 ECtHR, Enerji Yapi-Yol Sen v. Turkey, no. 68959/01.
366 See inter alia, Opinion of the European Economic and Social Committee on Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:024:0029:0034:EN:PDF

the policies and objectives of the EU under consideration of the principle of conferral of powers. Accordingly, the specific aim of the horizontal social clause is to ensure that all of the EU's activities take full account of the social dimension by following the five sub-objectives in Article 9 TFEU, in order to achieve the fundamental values and objectives of the EU within the scope of its responsibilities [367]. Article 9 TFEU forms the missing link between, on the one hand, the general social objectives mentioned in the TEU, in particular Article 3 TEU and, on the other, the competences of the EU as stated in the TFEU[368]. It is important to note that all sub-objectives of Article 9 TFEU except human health are expressly enlisted in Article 3 III TEU. Moreover, all sub objectives form part of other provisions in the Lisbon Treaty, namely the provisions on employment [369](Article 145-150 TFEU, social policy[370](Article 151-161 TFEU) education and vocational training, Article 165 TFEU [371]and health protection[372](166-168 TFEU). These provisions give the sub-objectives of the horizontal social clause a concrete form and contain legal bases for the EU to take action. The co-existence of Article 9 TFEU on the one hand and the above mentioned special provisions on the other can be interpreted to mean only that the EU institutions shall be obliged by Article 9 TFEU to make indeed use of their relevant competences. It is also clear, therefore, that Article 9 TFEU does not widen the competences of the EU. On the contrary, the applicability of Article 9 TFEU is preconditioned by existing competences. Article 9 TFEU as such is addressed to all European institutions, including the European Parliament, Council, CJEU, Commission. Moreover, also the Member States as indirect addressees are obliged to take full account of the horizontal social clause when implementing secondary legislation and in the frame of the open method of coordination. The addressees are obliged to make sure that the horizontal social clause is implemented within the relevant sphere of their

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367 Schorkopf/Grabbitz/Hilf/Nettesheim Article 9, para 6.

368 Pascal Vielle , The Horizontal Social Clause, in: The Lisbon Treaty and Social Europe 2012,

369 The term high level of employment is mentioned in Article 147 TFEU.

370 The terms guarantee of a high level of social protection is mentioned in Article 151 I TFEU, the terms fight against social exclusion is mentioned in Articles 153 I j TFEU, 151 I TFEU.

371 The terms high level of education and training are mentioned in the heading to Article 165 TFEU.

372 The terms protection of human health are mentioned in several provisions of the Treaties, see Articles 30, 45 III, 52 I, 114 III TFEU, and above all Article 168 TFEU.

responsibilities. The horizontal social clause is closely related with the idea of the social market economy in Article 3 III 2 TEU. It reflects very well the requirement to balance the economic and the social dimension of the European Union. In terms of its practical relevance the horizontal social clause gains especially significance for the ex- ante and ex-post assessment of legislatives acts. As regards the former it is amongst others of relevance for political decision makers like the European Commission before proposing a new legislative initiative. By a so called social impact assessment the European Commission assesses the potential economic, social and environmental consequences of legislative acts in the pipeline.[373] It is important to note that the horizontal social clause does not only find application in regard of legislative initiatives in the social field, but in the whole field of EU policies. The horizontal social clause is also relevant for the CJEU in the frame of an ex-post assessment of a legislative act.

The horizontal social clause constitutes an important tool to realize the objective of the social market economy according to Article 3 III 2 TEU. It´s significance must be seen in the fact that it offers policy makers a tool to address the social question not only in the field of social policy, but also in other policy fields as well. In this way, it is ensured that social issues are not neglected when new legislative acts are created. However, the horizontal social clause gives its addressees a wide leeway of discretion. It requests from the EU institutions and Member States only to make use of their social competences, but it does not give further indications in how far social issues have to be reflected in legislative acts. The horizontal social clause is therefore only subject to limited scrutiny by the CJEU. Like the reference to the social market economy in Article 3 III 2 TEU it has rather a political connotation.

3. Interim Conclusion

It must be concluded that the prospect of enhancing the social dimension through the concept of positive integration in comparison to the pre-Lisbon period is rather low. There is no doubt that the constitutionalization of the European values, the horizontal social clause and in particular the legally

373 http://ec.europa.eu/governance/impact/index_en.htm .

binding social rights of the CFREU have all contributed to a valorization of the social dimension of the internal market. However this development has not gone hand in hand with a widening of the social competences of the European Union. The competences on social issues are still divided between the Member States and the European Union. In addition to this, Article 153 V TFEU expressly excludes competences from the scope of EU law. A juxtaposition of the social competences with the economic competences of the EU proves that no fundamental improvements have been achieved; the two spheres are still not on an equal footing“[374]. „The possibility to create new legislation in the social field is very low. A further impediment constitutes the unanimity requirement. Substantial social protection continues to take place on the level of the Member States. Thus the impact of the social market economy on the substantive content of the European economic constitution is rather low.

E. II. The Realization of the Social Market Economy by Limiting the Effects of Negative Integration

The social market economy in the sense of Article 3 III 2 TEU might furthermore be realized by limiting the effects brought about by the concept of *negativeintegration*. In this situation the success of the social market economy depends, on the one hand ,on the will of the national legislator to create policy in the sense of Article 3 III 2 TEU, and on the other, on the CJEU to allow Member States to derogate from the material content of the European economic constitution on the basis of social policy considerations. In this constellation, as it was already mentioned before, the CJEU applies the precept of rule and exception after which the CJEU determines the limits of derogation via the principle of proportionality.

With the coming into force of the Lisbon Treaty the EU has not acquired new competences in the social field. This also means that the Member States continue to be the main actors in their national social models. Thus, the reverse side of the weakness of the EU in the social field is a far reaching autonomy of the Member States in shaping their national social models. This combination of weak competences of the EU on the one hand and broad

[374] See for this Lörcher 2012, 195.

competences of the Member States in the social field on the other is also related to the European Social Model[375] which was launched in the European Commissions´ White Paper on European Social Policy - A way forward for the Union[376] dating back to 1994. The European Social Model as a normative concept is rather a vague concept. Generally speaking , the European Social Model stands for a unity of values and objectives with diverse national social systems[377]". Among these values are democracy, individual rights, free collective bargaining, market economy, equality of opportunity for all, social welfare and solidarity.[378] " These values are held together by the conviction that economic and social progress must go hand in hand, competitiveness and solidarity have both to be taken into account in building a successful Europe for the future".[379]

In a Communication Paper entitled “European values in a globalized world” the European Commission made on the European Social Model the following statement[380]:

“National economic and social policies are built on shared values such as solidarity and cohesion, equal opportunities and the fight against all forms of discrimination, adequate health and safety in the workplace, universal access to education and healthcare, quality of life and quality in work, sustainable development and the involvement of civil society. These values represent a European choice in favour of a social market economy. They are reflected in the EU treaties, its action and legislation, as well as in the European Convention of Human Rights and our Charter of fundamental rights”.

In the Presidency Conclusions of the Nice European Council meeting in 2000 the European Social Model is defined as follows: " The European Social Model, characterized in particular by systems that offer a high level social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based,

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375 See further Barnard, European Labour Law 2012, 34.

376 COM 94, 333 final 1994.

377 Rogowski/ Kajtár The European Social Model and Coordination of Social Policy- An overview of policies, competences and new challenges at the EU level, 2004 .

378 COM 94, 333 final 1994, 4; see also Jens Alber, What - if anything - is undermining the European Social Model? , Lecture 1 at Charles University, Prague, March 2010.

379 COM 94, 333 final 1994, 4.

380 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of regions on “ European values in the globalised world, Brussels, 03.11.2005, COM(2005) 525.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0525:FIN:EN:PDF

beyond the diversity of the Member States social systems, on a common core of values"[381]. The European Trade Union Confederation(ETUC) defines the European Social Model as follows:" The European social model is characterized by the indissoluble link between economic performance and social progress, in which a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all, in accordance with the traditions of social progress rooted in the history of Europe and confirmed in the Treaties"[382].

As is well known, however, there is not only one European social model but all 28 EU Member States have unique social models[383]. These social models are broadly divided in the Continental- European, the Scandinavian the Anglo-Saxon and the South-European models. Here , it is less important to highlight the differences between these models but to focus on the commonalities constituting the European social model[384]. In this regard it can be stated that the autonomy of the Member States to shape their national social model refers amongst other to the following areas which considered in their entirety form the basis of the relevant national social model: social security of employees in the event of illness, invalidity, unemployment, retirement; minimum wages; employment protection, social dialogue. It was already shown, that the European Union is not able to harmonize these areas as it only has a shared competence in the field of social policy. The different national social models find also protection in the constitutions of the Member States. Like in Germany, almost all Member States have clauses like that of the social state principle in their constitutions[385] which enable legislators to intervene in the market process to

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382 Protocol on the Relation between Economic Freedoms and Fundamental Social Rights in the Light of Social Progress, Article 1 ETUC.

383 see Ferrera, M., The 'Southern Model' of Welfare in Social Europe, Journal of European Social Policy, 6(1), 1996, pp. 17-37, Esping-Andersen, G., Three Worlds of Welfare Capitalism, Polity Press, Cambridge, UK,1990

384 See Eva Maria Tscherner, Arbeitsbeziehungen und Europäische Grundfreiheiten 2012, 397.

385 the UK constitutes an exception from this

bring about social justice[386]. Thus , social policy on national level has a market correcting function[387].

For a long time this European social model has coexisted with the European economic constitution and the former was rather not exposed to the influence of the latter. This however has changed over the course of time, As Jens Albers has rightly stated, the European social model has been faced with supranational challenges[388] which do neither emanate from the lack of willingness by the relevant national legislator nor the European Union legislator to take legislative action in the social field. Here, it is above all the CJEU which has contributed to shape the European social model by way of negative integration. With its case law on the internal market it has jeopardized the social models of the Member States. To recall the fundamental market freedoms and the European competition rules as derivable rights from the European economic constitution enjoy according to the case law of the Court priority over the law of the Member States and are directly applicable in transnational situations. Thus in the course of time, the case law of the CJEU on the internal market lead to a gradual subordination of the European social model to the European economic constitution. It happened first that part of the social security systems of the Member States had to comply with the fundamental market freedoms. The CJEU handed down landmark decisions like Kohll[389] , Decker[390], Watts[391] where it ruled that national security systems fall under the scope of Community law, in particular the fundamental freedoms . By doing so the national social security systems were subordinated to the fundamental market freedoms and the Court paved the way for cross-border access to national public health care services. This all happened against the background that the EU has no regulating competence for the social security systems of the Member States. And the CJEU has followed this line of reasoning. In *Petersen*[392] the Court exemplary stated that:

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386 Katrougalos 2004, 2; see also : Fundamental Social Rights in Europe, Working Paper 1997, European Parliament SOCI 104 EN.
387 Streeck, From Market Making to State Building? Reflections on the Political Economy of European Social Policy,1996, 399
388 see Jens Albers, 2010.
389CJEU, Case C- 158/96 Kohll, 1998.
390CJEU, Case C- 120/95 Decker, 1998.
391CJEU, Case C- 372/04 Watts [2006] ECR I-4325.
392CJEU, Case C- 228/07, para 41-42.

> "It must be pointed out, however, that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes. Whilst in the absence of harmonization at Community level, Member States retain the power to organize their social security schemes, they must none the less, when exercising that power, comply with Community law and, in particular, the provisions of the EC Treaty on freedom of movement for workers".

In Hartlauer[393] the Court ruled in the same way:

> " First, it should be recalled that it is clear, both from the case-law of the Court and from Article 152(5) EC, that Community law does not detract from the power of the Member States to organize their social security systems and to adopt, in particular, provisions intended to govern the organization and delivery of health services and medical care. In exercising that power, however, the Member States must comply with Community law, in particular the provisions of the Treaty on the freedoms of movement, including freedom of establishment. Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector".

The CJEU extended exactly this line of reasoning to the area of the industrial relation systems of the Member States. The rulings in the Viking quartet must be mentioned here in which the Court, as is well known, showed a clear lack of respect for the particularities of national industrial relation systems. This is especially worrying in the light of the fact that also in this field the EU has no regulating competence as Article 153 V TFEU reveals. It can be inferred from this that there is an uneasy relationship between the fundamental market freedoms belonging to the European economic constitution and the national social models as part of the European Social Model. Catherine Barnard draws attention to this relationship by referring to it as a "lopsided triangle with the (dominant) EU economic freedoms at one point, national

[393]CJEU, Case C- 169/07, Hartlauer para, 29.

social rights at a second point and a rather rudimentary EU social policy at the third[394]. It is therefore right to say that the initial sovereignty of the Member States to shape their national social models is at odds with the European economic constitution.

It is generally acknowledged that the rulings in the Viking quartet are mainly attributable to the reasoning of the CJEU[395]. The Court promoted lopsided negative integration to the detriment of political and social rights and imposed on the relevant Member States a neoliberal economic model. This constitutes a danger for socio-political achievements. It is important to note that these rulings were handed down to a time when the open market economy with free competition formed the basis of the European Economic Constitution. As was note before, one important implication following from the market economic orientation of the European economic constitution has been the fact that social state interventions in the market have been seen as exceptions requiring justification. This begs the question, in how far the move from the open market economy with free competition towards a highly competitive social market economy might change the application of precept of rule and exception and put the Member States in a stronger position to combat the detrimental effects caused by the concept of negative integration. The answer to this question depends to a very big extent on the reasoning of the CJEU.

Accordingly, the main focus of the following will be on the analysis of the legal reasoning of the CJEU. In this regard, first the methods of interpretation of EU law and justification of restrictions in internal market law will have to be analyzed. Subsequently a case study will take place in which the CJEU had to deal with cases referring to restrictions of fundamental market freedoms on ground of social state interventions. The analysis will be split in two parts. The cases to be illustrated in the first part were handed down prior to Lisbon. In this regard the focus will be on the Viking quartet cases. In the second part then, cases belonging to the post -Lisbon era will be illustrated. The aim of the case study will be to investigate whether with the coming into force of the Lisbon Treaty the reasoning of the CJEU has

[394] See Barnard, Free Movement and Labour rights : Squaring the circle ? 2013.

changed, and if yes, whether this is attributable to the move from the open market economy with free competition towards the social market economy. Associated with that it will be investigated in how far the social novelties of the Lisbon Treaty have found application in the reasoning of the CJEU.

1. Methods of Interpretation and Legal Reasoning at the CJEU

According to Article 19 TEU the CJEU shall ensure that in the interpretation and application of the Treaties the law is observed. From this it can be deduced that the CJEU has a particularly important role to play in the European integration process, not least due to the fact that the provisions of the EU Treaties are vaguely defined and thus require interpretation. Generally speaking, the CJEU employs the methods of interpretation used by national constitutional courts. Accordingly, the methodology used by the CJEU to interpret primary and secondary EU law is comparable to the methodology undertaken by the BVerfG to interpret the Basic Law. Therefore reference can be made to the aforementioned analysis on the teleological, systematical, grammatical and historical methods of interpretation undertaken by the BVerfG. In addition to this, there is on EU level the comparative method of interpretation, which takes into account the different legal traditions of the Member States. The comparative method of interpretation plays in particular a significant role in interpreting fundamental rights in EU law as the CJEU employs the ECHR but also the common traditions of the Member States as the main sources for interpretation[396]. Other than in Germany, however, the grammatical interpretation plays a minor role. This is due to the fact that in a European Union with 23 official languages it is difficult to translate provisions in the same grammatical wording. The overriding method of interpretation used by the CJEU is the teleological-systematic approach. This was already acknowledged by the CJEU as early as in 1963 in *Van Gend en Loos* when it referred to the methods of legal interpretation. Here the Court stated that:" the EEC Treaty must be interpreted by taking into consideration the spirit, general scheme

396 Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System- An analysis of the European Court of Human Rights and the Court of Justice of the European Union, 2011, 104.

and the wording of the provisions"[397]. What stands out immediately is the order in which the methods of interpretation are mentioned. By naming the teleological method of interpretation first followed by the systematic and the grammatical method of interpretation, the CJEU, although not creating an order of precedence, provided gainful information on the relevance of the methods to be employed in EU law"[398].

In EU law, the teleological and systematic methods of interpretation are interrelated and often employed together by the CJEU**.** The former Advocate General at the CJEU Maduro attributes this to the fact that:

> 'Teleological interpretation in EU law does not refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. In other words, the Court was not simply been concerned with ascertaining the aim of a particular legal provision. It also interpreted that rule in the light of the broader context provided by the EC(now EU) legal order and ts "constitutional telos". There is a clear association between the systemic(context) and teleological elements of interpretation in the Court´s reasoning. It is not simply the telos of the of the rule to be interpreted that matters but also the telos of the legal context in which those rules exist. We can talk therefore of both a teleological and a metateleological reasoning in the Court'[399].

This view is consistent with the view of the CJEU as can be concluded from *CILFIT*. Here, the Court stated that:

> "Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied"[400].

As a matter of fact, the interpretation of the Court hinge upon the purpose of the relevant provision as well as the whole system the provision belongs to. From this it can also be derived why the fundamental market freedoms and

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397 CJEU case C- 26/62 Van Gend en Loos, [1963] ECR.
398 Werner Schröder, JuS 2004,183.
399 Maduro 2007, 12.
400 CJEU Case C- 283/81 Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health [1982] ECR I 3415, para 20.

the European competition rules are interpreted restrictively by the CJEU. Both, the competition rules and the fundamental market freedoms concretize the objective of the establishment of the internal market. The reason for the prominent position of the teleological interpretation method has to be seen in the fact that the institutions of the EU as well as the Member States are on the one hand bound by the objectives of the EU and on the other they have to realize these objectives by effet utile[401]. The Court takes generally into consideration the reason for the very existence of the European Union.

Attention must also be drawn to a specific feature when analysing the legal reasoning of the CJEU, namely the distinction between interpreting EU law and practising judicial activism. This has to do with the fact that the CJEU not only employs the methods of interpretation to interpret European law according to its original function, but also practises judicial activism on the basis of the above mentioned methods of interpretation, in particular the systematic- teleological interpretation[402]. Judicial activism as opposed to judicial restraint refers to the 'willingness of the courts to create public policy when the political institutions of government either cannot or will not'[403]. To put it differently, judicial activism refers to the transfer of legislative rights to the courts. Just to name a few examples, the direct effect of EU law, its precedence over national law, the classification of fundamental market freedoms as prohibition of restrictions rather than prohibitions of discrimination and the horizontal effect *(Drittwirkung)* of fundamental market freedoms are not results brought about by the European Union legislator but can be solely traced back to judicial activism as practiced by the CJEU. With the establishment of these means of negative integration the CJEU but also the European Commission have gradually enhanced the range of negative integration without taking into consideration the Council of Ministers[404]**.** But the CJEU is strongly criticized for its exercise of judicial activism and thus for

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401 Werner Schröder, JuS 2004, 184.

402 See for this Tridimas, The Court of Justice and Judicial Activism, 21 European Law Review 199, 1996;

403 Yavuz Aydin in: The European Court of Justice has clearly returned to its early days of judicial activism, taking bold-and often boundary-pushing steps-int exercise of its mandate as a guardian of the Treaties" http://www.justice.gov.tr/e-journal/pdf/european_court.pdf.

404 Fritz Scharpf http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp97-8/wp97-8.html

deviating from its original role towards a political actor[405]. The critique refers mainly to the fact that the court is practicing European integration policy without having the necessary legitimacy to do so but also for having taken over a role which was not covered by Article 19 TEU. Höpner considers the CJEU as an "engine of integration " due to its pro-European case law [406]. According to him, the Court has gradually taken on the role of a legislator and altered the legal order of the EU but also the Member States which would have detrimental effects for the Member States and their social models, not taking into consideration the exceptions foreseen in Article 153 V TFEU. It is furthermore argued that the Member States did not legitimized the CJEU for practicing negative harmonization, as harmonization of the laws was a task which belonged to the realm of the European Union legislator.

2. The Method of Justification in EU Internal Market Law

For the appraisal of restrictions of fundamental market freedoms by the CJEU employs a precept of rule and exception "whereby the openness of the market and undistorted competition constitute the rule, and interferences with these guarantees of the European economic constitution the exception requiring justification**"[407].** This approach goes back to the market economic orientation of the EU and is directly linked with the principle of proportionality[408]. In the following the precept of rule and exception and the principle of proportionality will be further illustrated.

2.1. The Precept of Rule and Exception

In a judicial process in the field of internal market law the CJEU first examines whether the national measure falls within the scope of EU law. Only if the CJEU affirms this question, it continues its assessment. In a further step, the CJEU examines whether an interference in a fundamental market freedom or the competition rules is given. In order to assess this, the Court utilizes in general two approaches, namely the prohibition of

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405 See for this Matthias Höpner, Usurpation statt Delegation: Wie der EuGH die Binnenmarktintegration radikalisert und warum er politischer Kontrolle bedarf, 2008 MPlfG Diskussionspapier 08/12;
http://aei.pitt.edu/14470/1/CES_176.pdf

406 Matthias Höpner, Berliner Journal für Soziologie 2011, 203.

407 Hatje 2010, 630.

408 Hatje 2010, 630.

discrimination and the prohibition of restriction approach. These approaches are mutually not exclusive. Until the mid 1970s the fundamental market freedoms were solely seen as principles of equal treatment. This can be traced back to the fact that fundamental market freedoms were initially established to prohibit discrimination on grounds of nationality on domestic markets[409]. This reflects very well the main idea behind the establishment of the non discriminatory common market on the basis of fundamental market freedoms, namely to fight national protectionism within the then EEC. In the course of time the CJEU extended the interpretation of fundamental market freedoms from mere prohibitions of discrimination on the basis of nationality to comprehensive prohibitions of restrictions[410] which shows clear elements of economic fundamental rights[411]. This is attributable to the fact that the Court recognized that also non discriminatory measures could prevent or render the achievement of the Community´s objective of freedom of movement for persons and goods. Against this background it found it therefore necessary to extend the interpretation of fundamental market freedoms from prohibitions of discrimination into prohibition of limitations[412]. The starting point of this line of reasoning was *Dasonville*[413] which concerned the free movement of goods. In this case the Court stated that "measures equivalent to quantitative limitations within the meaning of Article 28 of the TEC refer to any national regulation which is capable of hindering, directly or indirectly, actually or potentially, intra-community trade[414]. The Court widened this line of reasoning to the other market freedoms as well. In the course of time the Court started to interpret all fundamental freedoms in a similar way as prohibiting both discriminations based on nationality and limitations. In regard of the freedom to provide service it is generally recognized that it was in *Säger/Dennmeyer*[415] when the Court first applied the limitation approach. Here, the Court stated that:

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409 Christian Walter 2007, 17.
410 Barnard, 37 European Law Review, 2012, 118.
411 Christian Walter, History and Development of European Fundamental Rights and Fundamental Freedoms 2007, p.18. in: Dirk Ehlers, European Fundamental Rights and Freedoms, 2007.
412 Streinz, Europarecht 2012, 805.
413 Christian Walter 2007, 19.
414 Christian Walter 2007, 21.
415 EUGH Rs C- 76/90, Säger/Dennemeyer, Slg 1991, I-4221.

> "Not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services"[416].

The prohibition of restriction approach constitutes an effective tool "to cut through swathes of national rules"[417] and thus to promote the market making process. This however has detrimental effects for the regulatory autonomy of Member States as the focus of this approach is solely on the effect of the rule on the out-of state provider"[418]. The prohibition of restriction approach extends the scope of application of the precept of rule and rule-exception. Even if a national regulation is non discriminatory, it can restrict the market access and thus it will fall under the scope of the precept of rule and exception. The prohibition of restriction approach can be traced back as stated before to the teleological interpretation of the CJEU.

To continue, any state interference in the fundamental market freedoms and European competition rules must be justified by legitimate purposes. Conversely, neither the fundamental market freedoms nor the European competition rules are absolute and thus can be restricted. In evolutionary terms it was first the issue of the public interest which provided valid grounds for justifying derogations from the free movement provisions on goods, persons, services and capital. There are generally two types of such public interest justifications: on the one hand there are express derogations, which are explicitly and exhaustively prescribed by primary or secondary EU law[419]; and on the other hand, unwritten rule of reasons based on CJEU

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[416]CJEU, Case C-76/90 [1991] ECR I 4221, para 12.

[417] Barnard Employment Rights, Free Movement Under the EC Treaty and the Service Directive
Mitchell Working Paper Edinburgh Europa Institute 5 / 2008, 2.

[418] Barnard Employment Rights, Free Movement Under the EC Treaty and the Service Directive
Mitchell Working Paper Edinburgh Europa Institute 5 / 2008, 2.

[419]express derogations in primary law: Articles 36, 45(3), 45(4),51(1), 52(1), 62 TFEU; for express derogations in secondary law see for example Article 3(1) of Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the EU[2011] OJ L 141/1.

rulings pursuant to the Cassis de Dijon[420] judgment. As opposed to express derogations the rule of reasons are not exhaustive and have been developed by the case law of the CJEU in the course of time. It is worth to mention, that according to the consistent case law of the CJEU the protection of workers[421], the prevention of social dumping[422], unfair competition[423], the avoidance of disturbances on the labour market[424]are among the overriding reasons of public interest justifying restrictions on the exercise of the fundamental market freedoms. In the course of time there have been important developments in the case law of the CJEU which concerned further derogations from internal market rules**.** According to that, the CJEU allowed amongst others derogations from internal market rules based on requirements of fundamental rights in *Schmidberger*[425] and a fundamental value in Omega[426], laid down in the constitutions of the Member States. In regard of the latter, however, the CJEU classified human dignity not as a fundamental value or fundamental right, but only as a public policy concern. As a matter of fact and in regard of the mandatory requirements, the fundamental market freedoms can not only be limited on grounds of public interest concerns, but also fundamental rights and fundamental values.

2.2.The Principle of Proportionality

Of fundamental importance is furthermore the fact, that the express derogations and mandatory requirements will only be effective, when the restrictions comply with the principle of proportionality. The principle of proportionality plays therefore a pivotal role for the appraisal of the legality of limitations to the fundamental market freedoms. As was stated before, the precept of rule and exception is directly linked to the principle of

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[420] Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung für Brantwein(Cassis de Dijon), [1979] ECR 649.
[421] See, inter alia, Case C-438/05 International Transport Workers' Federation and Finish Seamans Union v. Viking Line[2008] paragraph 77; Case C-319/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareforbundet and others[2008] paragraph 103; Joined Cases C-369/96 and C-376/96 Arblade and Others[1999] ECR I- 8453, paragraph 36; Case C- 165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 27; Joined Cases C- 49/98, C-50/98, C-52/ 98 to C- 54/98 and C- 68/98 to C- 71/98 Finalarte and Others [2001] ECR I 7831, paragraph 33
[422] CJEU, Case C- 244/04 Commission vs. Germany [2006] ECR I-000, para 61.
[423] CJEU Case C-60/03 Wolf Müller vs. Perreira Felix [2004] ECR I-9553, para 41.
[424] CJEU Case C- 445/03 Commission v Luxemburg[2004] ECR I- 10191 para. 38.
[425] Case C- 112/00 Schmidberger [2003] ECR I - 5659.
[426] Case C-36/02 Omega[2004] ECR I- 9609.

proportionality as the CJEU assesses on the basis of the principle of proportionality whether restrictions of fundamental freedoms are reasonable.

The principle of proportionality finds application in several areas of Community law and thus it can be seen as one of the most important horizontal provisions of EU law. To begin with, the principle of proportionality as an explicit component of EU law has three different legal bases, however with differing scopes of application. First, the principle of proportionality is legally defined in Article 5(4) TEU[427]. This Article is solely addressed to the institutions of the Union and aims to impose limits upon the exercise of competences of the EU [428]. Second, the principle of proportionality finds mentioning in Article 52(1) CFREU. This Article has the following wording:
"(..) Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

From the wording of Article 52(1) CFREU it can be inferred that a limitation of a fundamental right may take place when a legitimate objective of the EU and the principle of proportionality is respected. In regard of the former it is important to note that fundamental freedoms are mainly utilized to create the internal market, which is, according to Article 3 TEU, an objective of the EU. Thus, since the realization of a fundamental market freedom constitutes a legitimate limitation of a fundamental right, it is the principle of proportionality which is used to assess whether a limitation of a fundamental right by directly invoking a fundamental freedom is proportionate and thus in accordance with EU law. Lastly, the principle of proportionality is also considered as a general principle[429] of Community law. As this it was first

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[427] Article 5(4) TEU has the following wording: Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

[428] Kaczorowska, European Union Law, 2009:102.

[429] According to Koen Lenaerts, judge at the CJEU, general principles of EU law have three main features; firstly, they enable the CJEU to fill normative gaps in EU law, secondly they are utilized as an interpretative aid for interpreting EU law , and lastly general principles are significant with regard to judicial review, see: Koen Lenaerts , Jose A. Gutierrez-Fons, The

recognized by the CJEU in 1956 in *Federation Charbonniere de Belgique v High Authority*[430]. In the form of a general principle of Community the CJEU applies the principle of proportionality for assessing the legality of limitations by Member States to the fundamental freedoms. Given to the fact that fundamental freedoms are in the first place addressed to the Member States, it is the task of national policy makers to take this principle into consideration when legislating. This also means that prior to the adoption of a national measure, it is the task of the relevant Member State to assess the foreseen measure on its compatibility with the fundamental freedoms. This includes employing a proportionality test, too. From this it can be concluded that the principle of proportionality has a broad scope of application.

Concerning the components of the principle of proportionality it is generally acknowledged that the principle of proportionality in EU law is attributable to German law[431]. Accordingly, like in Germany, the state interference must be suitable, necessary and proportionate in the narrow sense. Nevertheless, the application of the principle of proportionality as employed by the CJEU differs from the BVerfG. The CJEU employs two different approaches to the principle of proportionality, depending on whether EU regulation or national regulation is assessed[432]. Thus, when the CJEU has to assess regulatory measures belonging to the sphere of the Union, it applies a rather modest proportionality test consisting of the above mentioned three subtests[433]. Exemplary, in *Agrana Zucker* the Court stated that:

> "In that regard, it should be recalled that the principle of proportionality, which is one of the general principles of European Union law, requires that acts adopted by institutions of the European Union do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the

constitutional allocation of powers and general principles of EU law, Common Market Law Review 47, 1629-1969, 2010.

430 CJEU Case C- 8/6´55[1956] ECR Germany(1955-1956) 297.

431 Andreas Voßkuhle, Der Grundsatz der Verhältnismäßigkeit, JUS 2007,429; Uwe Kischel, Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof, EuR 2000,380.

432 Tor-Inge Harbo 172, 173, Cahterine Barnard, Trsteniak

433 See CJEU Case C- 265/87[Schräder HS Kraftfutter] ECR 1989, 2237, para 21.

disadvantages caused must not be disproportionate to the aims pursued"[434].

On the other hand, when assessing regulatory measures of the Member States the CJEU does not apply the proportionality test in the narrow sense but narrows down the proportionality test to a suitability and appropriateness test. This approach is much stricter and the CJEU will declare national legislation as non conform with EU law if it comes to the conclusion that the national legislator has not chosen the least restrictive alternative. The difference in the intensity of review is attributable to the fact that in internal market law the principle of proportionality is used as a tool to promote European integration, in particular to "further market integration"[435]. The principle of proportionality therefore can´t be regarded as value- neutral[436]. Moreover, in the frame of the proportionality test, the burden of proof for the justification of derogations from fundamental freedoms is imposed on the Member States[437]. According to the case law of the CJEU, a derogation from the fundamental freedoms is only justified when the Member States can proof that measures restricting fundamental freedoms are in compliance with the principle of proportionality.

3. Case Law of the CJEU in the Pre-Lisbon Era

What wages and employment conditions are applicable to posted workers carrying out temporarily work in the territory of another Member State? Should their employment relationship be governed by the laws of the host country or the country of origin? How should the balancing of fundamental market freedoms with the right to take collective action within the internal market take place? These questions were, in 2007 and 2008, raised in the cases of Viking, Laval, Rüffert and Commssion vs, Luxemburg. These four cases, which have come to be known as the Laval quartet have triggered a

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434 CJEU Caes C- 365/08[Agrana Zucker] ECR 2010, I-4341, para 29; see also CJEU Case C-150/19 [Beneo Orafti}, ECR 2011 , I - 0000, para 75; CJEU Cases C- 15/10 [Etmine], ECR I-0000, para 124; CJEU Case C- 343/09 [Afton Chemical], ECR 2010 I -7023; CJEU Cases C-33/08 [Agrana Zucker], ECR 2009 , I - 5035; para 31; CJEU Cases C- 45/05 [Maatschap Schonewille-Prins] ECR 2007, I- 3997, para 45.

435 Nikolett Hös, The Principle of Proportionality in the Viking and Laval Cases: An appropiate standard of Judicial Review?(2009) EUI Working Paper Law 2009/06.

436 Tor -Inge Harbo , 2010, 172.

437 Dauses/Brigola in Dauses, Wirtschaftsrecht der EU, Artikel 36,para 38.

controversial political and judicial discussion[438]. The cases Laval, Rüffert and Luxemburg concerned issues around Directive 96/71 on posted workers(hereinafter PWD). The PWD´s general aim is to find a balance between three different policy goals. First, to promote the free movement of services, secondly to protect workers in the host state from competition from workers from home states where labour standards in terms of remuneration and protection are lower, and thirdly to protect posted workers by improving their working conditions. At the center of the Viking case and to a certain extend in Laval were collisions between fundamental market freedoms and the right to take collective action. It is important to note that this was not the first time that the Court had to deal with the delicate relationship between fundamental market freedoms and fundamental rights. Viking and Laval were amongst others preceded by the landmark cases Schmidberger[439] and Omega[440]. In the latter two cases national fundamental rights and values respectively triumphed over fundamental market freedoms. Accordingly, these cases were generally considered as the end of the hegemony of ordoliberalism in the reasoning of the CJEU. But as is well known, this assumption proofed to be wrong. In the reasoning of the Court in Viking and Laval but also Rüffert and Commission vs. Luxemburg there are still strong traces of ordoliberalism. In the following theses cases will be first illustrated and subsequently analyzed.

3.1. Schmidberger[441]

The Austrian government had allowed a political demonstration on the Brenner motorway by a environmental group against the pollution of the Alps, caused by the heavy traffic on the Brenner motorway, the main traffic link between northern Europe and Italy. Due to the demonstration , the Brenner motorway was completely closed to traffic for approximately 30 hours. Schmidberger, a German transport company, argued that the closure of the Brenner motorway infringed the free movement of goods, Article 28 EC

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438 See for this: The impact of the ECJ judgments on Viking, Laval, Rüffert and Luxemburg on the practice of collective bargaining and the effectiveness of social action, European Commission, DG Employment(2010).
439 Case C- 112/00 Schmidberger, 2003, ECR I - 5659.
440 Case C-36/02 Omega[2004] ECR I- 9609.

441 Eugen Schmidberger, Internationale Transporte und Planzüge v Austria[2003] ECR I-5659.

and sued Austria for damages. The Court was confronted with a conflict between Schmidbergers invocation of a fundamental economic freedom protected under Article 34 TFEU(ex. Article 28 EC) and Austria´s invocation of the fundamental right of its citizens, guaranteed not only under the domestic Austrian constitution but also under Article 10 and Article 11 of the ECHR, to freedom of expression and assembly.

The CJEU first affirmed that the closure of the Brenner motorway restricted the free movement of goods. The Court then dealt with the question whether this restriction was justified . As regards this subject it is important to note that the referring Austrian Court had explicitly asked whether the free movement of goods enjoyed priority over the fundamental rights at issue.

The CJEU took the view that the restriction in the present case was justified by the protection of fundamental rights, which formed an integral part of the general principles of EU law. As regards this subject, the Court added the following:

> " First ,whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest[442]."
>
> Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular proportionate to the legitimate aim pursued"[443].
>
> Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman

[442] CJEU Case Schmidberger, para 78.
[443] CJEU, Schmidberger, para 79.

> degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed"[444]. In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests[445].

In order to resolve the conflict in the present case the Court assessed whether the restriction of the free movement of goods through the exercise of fundamental rights was proportionate to the protection of those rights[446]. Conversely, however, the Court examined, in how far the enforcement of the free movement of goods would have resulted in an excessive interference in the exercise of the fundamental rights.[447] From this approach it can be inferred, that in the present case the CJEU considered the conflicting fundamental freedom and fundamental right as having equal rank.

The Court then drew attention to a number of factors to affirm the proportionality of the restriction of the free movement of goods. Accordingly, the Court first stated that the demonstration at issue in the main proceedings took place following a request for authorization presented on the basis of national law. The Court proceeded to state that the demonstration obstructed the traffic on the Brenner motorway only on a single route, on a single occasion and during a period of almost 30 hours. The Court took furthermore the view that the purpose of the demonstration was not to restrict trade in goods of a particular type or from a particular source. In addition the Court expressed the view that supportive administrative measures were taken to limit the implications of the demonstration. The demonstration gave also no

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444 CJEU Schmidberger, para 80.
445 CJEU Schmidberger, para 81.
446 CJEU Schmidberger, para 82.
447 CJEU Schmidberger, para 88.

rise to a general climate of insecurity, which had a negative effect on trade. Lastly, an outright ban of the demonstration would lead to an unjustifiable interference with the fundamental rights of the demonstrators. As a result, the restriction on the free movement of goods arising through the exercise of the fundamental rights at issue was regarded as justified.

This judgment is of utmost importance as the CJEU gave a political fundamental right priority over a fundamental market freedom. Furthermore, the approach of the CJEU to balance the conflicting interests at stake is worthy of remark. In the present case, the Court did not apply the precept of rule and exception to the detriment of fundamental rights but considered the conflicting positions as having equal rank.

3.2. Omega[448]

Omega was a German company that operated a laserdrome, where amongst others games simulating acts of homicide were hold. For running the laserdrome, Omega used equipment that was supplied by the firm Pulsar International Limited in Great Britain. The police authority of the city of Bonn issued a ban prohibiting Omega to further operate the laserdrome as this business idea constituted an interference with the public order, which included also human dignity as guaranteed in Article 1 (1) of the German Basic Law. Omega argued that the public order notice was not in compliance with Community la, in particular with the freedom to provide services, Article 49 TFEU(ex. Article 43 EC). The Bundesverwaltungsgericht (German Federal Administrative Court) submitted to the CJEU the question whether the prohibition was compatible with the freedom to provide services as the equipment to be used in the laserdrome was supplied by the Bristish firm Pulsar.

The CJEU first affirmed that the ban restricted Omega´s freedom to provide services. It added, however, that this was justified. The Court made clear that the freedom to provide services allowed for restrictions justified by public policy, public security or public health. In the present case, the CJEU affirmed a threat to public policy by reason of the fact that, in accordance with the conception prevailing in the German public opinion the commercial

[448] Case C- 36/2002, Omega Speilhallen - und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn[2004] ECR I -9609.

exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity[449]. As regards this subject, the Court, by making reference to its reasoning in Schmidberger, acknowledged that fundamental rights formed an integral part of the general principles of law.[450] It went on and stated that:

> "The Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right"[451]. Since both, the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services."[452]

The Court then made clear that the restriction of the freedom to provide services was only justified if the prohibition was necessary for the protection of the interests which it intended to guarantee and only in so far as this objectives could not be attained by less restrictive measures.[453] As regards the proportionality of the prohibition, the Court first stated that the need for and adoption of provisions such as the German prohibition on laser games was not only excluded merely because one Member State has chosen a system of protection different from that adopted by another State.[454] According to the Court the prohibition on the shooting game corresponded to the level of protection of human dignity which the national constitution seeks to guarantee in Germany. By prohibiting only the variant of the laser game the object of which is to fire on human targets and thus play at killing people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities[455].

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449 CJEU Omega para 33
450 CJEU Omega, para. 34.
451 CJEU Omega, para. 35.
452 CJEU Omega para 35.
453 CJEU Omega para 36.
454 CJEU Omega, para 37.
455 CJEU Omega, para 39.

Like in Schmidberger, also in this case the CJEU gave a national concern priority over a fundamental market freedom. This case shows also very well that the guarantee of human dignity does not provide the same protection in all Member States[456]. This becomes even more clear if taking into consideration that in the United Kingdom the shooting game is legal and the business idea is exported by franchise contracts and patent technology. Accordingly, the value and the fundamental right of human dignity cannot be interpreted autonomously by the CJEU.

3.3. Viking

The Viking shipping line ran ferry services, including the vessel Rosella between Tallinn and Helsinki under a Finnish flag. Viking decided to reflag its ferries under the Estonian flag and associated with that to employ an Estonian crew. By doing so, Viking intended to make use of the comparatively low wage costs in Estonia. As a response to this, the Finish union of seamen(FSU) issued a warning to Viking that they might hold a strike to stop the reflagging of the Rosella. Furth to this, the International Transport Workers Federation(ITF) which had been running a Flag of Convenience(FoC) campaign aimed to hinder the ship owners from taking just such action, called on its affiliates to boycott Rosella and to carry out sympathy actions against both, Rosella and other Viking vessels**.** Viking brought an action before the English courts requesting it to declare that the action taken by the International and Finnish union was contrary to Article 49 TFEU (ex. 43EC). The Court of Appeal, before which FSU and ITF lodged an appeal, referred to the CJEU in the frame of a preliminary ruling a number of questions related to the following issues: the right to take collective action as a fundamental right; the scope of freedom of establishment and the question whether employment law is included in this scope; the horizontal direct effect; and the proportionality test with regard to collective action [457].

The Court first dealt with the question, in how far the right to take collective action, including the right to strike felt under the scope of EU law. This question came up against the background of (ex Article 137(5)EC) after which the Community has no competence to regulate the right to strike and

[456] see for this Frank Schorkopf, Dignity of Man, 2007, 403.
[457] Viking-Laval-Rüffert: Consequences and Policy Perspectives, ETUI, 2010, 10.

the right to impose lock-outs. The Court acknowledged that Member States were free to lay down conditions to govern the existence and the exercise of the rights in question but added, while doing that the Member States were obliged to comply with Community law. The Court was also of the opinion that the right to take collective action, including the right to strike felt within the scope of the freedom of establishment. The CJEU first stated that the right to take collective action, including the right to strike , must be recognized as a fundamental right, as it formed an integral part of the general principles of Community law. In this regard the Court made amongst others reference to the European Social Charter, ILO Convention 87 and Article 28 CFREU. However, by making reference to the landmark cases Schmidberger[458] and Omega[459], the CJEU made clear that the exercise of the right to strike was not absolute, but might be subject to certain restrictions. Thus, the exercise of the fundamental rights at issue had to be reconciled with the requirements related to rights protected under the Treaty, and to be in accordance with the principle of proportionality[460]. The CJEU proceeded and clarified that the free movement provisions could be invoked against trade unions as private legal entities. The CJEU thus affirmed the horizontal direct effect of the free movement provisions by asserting that contrarily the objectives of the single market and the exercise of the fundamental market freedoms would be at risk , since trade unions as legal entities could impose restrictions.

The CJEU then continued and stated that the collective action at issue restricted the Viking´s freedom of establishment. The court based its reasoning on the ground that the collective action such as that envisaged by FSU had the effect of making Viking´s exercise of freedom of establishment less attractive, as the strike prevented Viking from moving to another EU country with lower wages and to enjoy the same treatment in the host Member State as other economic operators[461]. Also ITF´s Flags of Convenience policy had to be considered at least liable to restrict Vikings exercise of its right of freedom of establishment[462].

[458]CJEU, Schmidberger, para 77.
[459]CJEU, Omega, para 36.
[460]CJEU, Viking, para 46.
[461]CJEU, Viking, para 73.
[462]CJEU, Viking, para 74.

On the question of the justification of the restriction, the Court stated that the right to collective action was a legitimate interest, which in principle justified a restriction of fundamental market freedoms. Furthermore, the Court made clear that the protection of workers was one of the overriding reasons of the public interest recognized by the Court[463]. The Court added, however, that "such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardized or under serious threat"[464]. It can be inferred from this that according to the point of view of the Court collective action was subject to the condition that it must aim to protect jobs and conditions of employment. Only if this is the case, the principle of proportionality must find application by the national court. The CJEU, although leaving the exercise of the proportionality test to the national court, provided indirectly the frame in which the proportionality test had to be exercised. The Court affirmed the suitability of the collective action. In the view of the Court it was generally recognized that industrial action constituted one of the key tasks of trade unions to protect the interest of their members**.** In regard of the necessity , the CJEU stated that it was the task of the national court to examine on the basis of national rules in how far FSU did have other means available which were less restrictive to the freedom of Establishment and, furthermore, whether FSU had exploited its means at disposal before initiating collective action[465]. From this it can be concluded that according to the CJEU the strike action must constitute the last resort[466].

3.4. Laval

The Latvian company Laval un Partneri Ltd. won a tender for construction work at a school in Sweden. To perform its obligations following from the signed contract, Laval posted its own workers from Latvia to Sweden. In accordance with the standard practice in the Swedish industrial relation system, Swedish trade unions commenced negotiations with Laval to conclude a collective agreement on wages and other working conditions,

[463]CJEU, Viking, para 77.
[464]CJEU, Viking para 81.
[465]CJEU, Viking, para 87.
[466] see for this Barnard 2008, 17.

which is generally done on a case by case basis. Given to the fact that Laval was interested to make use of Lativa´s lower standard of wages, it concluded a collective agreement not in Sweden but in Latvia where workers earned 40 per Cent less than comparable Swedish workers. As a result of the failed negotiations, Byggnadsarbetareförbundet, a Swedish construction trade union, took collective action by blockading Laval´s construction sites in Sweden**.** Other Swedish trade unions, like the electricians trade union supported by solidarity the collective action. As a consequence of the collective actions it was for Laval no longer possible to carry out construction work in Sweden[467]. Thereupon, Laval lodged a complaint before the Swedish labour court**,** arguing that the collective action and the blockade of the construction side but also the sympathy strike were not in compliance with Article 56 TFEU(ex. Article 49 EC).The Swedish labour court submitted to the CJEU the question in how far the collective action in question was compatible with the freedom to provide services and with the provisions of the PWD.

In its reasoning the Court first assessed the compatibility of the collective action in the present case with Community law. Like in Viking and with the same reasoning it stated that the collective action in the present case did neither fall outside EU law nor Article 56 TFEU (ex Article 49 EC) and Directive 96/71. With regard to the right to strike as a fundamental right and the scope of the fundamental market freedoms, Court referred again to its judgment in Viking. The Court then went on and made clear that the collective action in the present case constituted a restriction fn the freedom to provide services within the meaning of Article 56 TFEU (ex Article 49 EC). Just like in Viking the Court took the view that the collective action in the present case was liable to make it more difficult for undertakings established in other Member States to carry out construction work in Sweden since they could be forced to sign the collective agreement for the building sector[468]. In regard of justification of the restriction the Court stated that" the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public

[467] CJEU, Laval, para 38.
[468]CJEU, Laval, para 99.

interest within the meaning of the case-law of the Court which, in principle, justified a restriction of fundamental freedoms guaranteed by the Treaty"[469].

The Court went on and stated that the collective action in the present case violated the principle of proportionality. The Court first clarified that Community law did not prohibit Member States from requiring undertakings to comply with their rules on minimum pay by appropriate means[470]. But the Court took the view that the Swedish minimum wage system was not compatible with the PWD. In the point of view of the Court the Swedish rules on the minimum wages were not sufficiently precise and accessible which as a result made it impossible or excessively difficult in practice for undertakings established in another Member State to determine the obligations with which it is required to comply as regards minimum pay[471]. The Court considered against this background the collective action as unsuitable to protect workers against social dumping.

3.5. Rüffert [472]

The German building company Objekt und Bauregie GmbH & Co won a tender with the Land Niedersachsen (the German state of Lower Saxony) for the conduct of construction work at a prison. Article 3(1) of the Public Procurement Act(*Landesvergabegesetz*) of Lower Saxony foresaw that contracts for building services were to be awarded only to undertakings which, when lodging a tender, undertook in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in the place where those services were performed. Article 4 (1) of that Act further provided that in so far as services were assigned to subcontractors, the contractor had to impose on the subcontractors the obligations applicable to him and to monitor compliance with these obligations by the subcontractors. Article 8 (1) of the Landesvergabegesetz provided a contractual penalty of up to 10% of the contract value in case of non- compliance with the above mentioned obligations. In the contract with Lower Saxony the building company committed itself to comply with the collective agreements in force on the

[469]CJEU, Laval, para103.
[470]CJEU, Laval, para 109.
[471] CJEU, Laval, para 110.
[472] CJEU, Case C- 346/06 Rüffert vs Land Niedersachsen .

construction site, in particular with the statutory minimum wage. The building company then subcontracted the work to a Polish firm. Later on it turned out that 53 Polish workers belonging to the subcontractor had been paid only 46.57% of the statutory minimum wage. The Land Niedersachsen canceled the contract and imposed financial penalties on the company. The company challenged this decision and took legal action. The competent German court submitted to the CJEU the question whether the freedom to provide service would be compromised in a case of public tendering under the condition that at least the remuneration prescribed by the local collective agreement needs to be paid , when performing the tendered services with employees.

The CJEU came to the conclusion that the Public Procurement Act of Niedersachsen was not in compliance with the PWD interpreted in the light of Article 56 TFEU(ex Article 49 EC) Accordingly, the Court was of the opinion that the Niedersachsen´s Public Procurement Act restricted the freedom to provide service. The CJEU took the view that the commitment of undertakings performing public works contracts but also their subcontractors to apply the minimum wage laid down by the relevant collective agreement**,** was capable of constituting a limitation within the meaning of Article 56 TFEU(ex. Article 49 EC).

The Court considered the restriction as not justified[473]. It rejected the justification on ground of protecting workers interests due to the fact that the Landesvergabegesetz was only applicable to public but not private contracts. The Court stated that there was "[n]o evidence to support the conclusion that the protection resulting from such a rate of pay–which, moreover, as the national court also notes, exceeds the minimum rate of pay applicable pursuant to the AEntG- is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract".[474] For the same reason, the Court rejected a justification on the basis of the autonomy of the "independence of working life by trade unions"[475] and the financial sustainability of the social security systems.

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473 The Advocate General Bot considered the Landesvergabegesetz as a concern of the public interest, namely the protection of workers.
474 CJEU, Rüffert, para 40.
475 CJEU, Rüffert para 41.
Rüffert para 42.

3.6. Commission vs. Luxemburg[476]

Commission vs. Luxembourg concerned the interpretation of Article 3 (10) of the PWD. This provision allows for exceptions to the restrictions set out in Article 3(1) PWD, provided that those exceptions are "so crucial for the protection of the political, social, or economic order in the Member State concerned as to require compliance by all persons present on the national territory of that Member State and all legal relationships by the state. Accordingly, the CJEU had to deal with the question whether national labour law provisions by the Grand Duchy of Luxembourg could count as "public order legislation" or public policy exceptions within the meaning of Article 3(10). In legislation transposing the PWD, the Grand Duchy invoked this exemption to justify the requirement that all workers posted to its territory linked by a written contract of employment to their home country employer, and that all rates of remuneration, not only minimum wages of any form, be indexed to the cost of living, among others. The Grand Duchy contended that the imposition of those obligations were imperative to the national public interest, inasmuch as they were deemed to be indispensible to the maintenance of good labour relations in Luxembourg. Luxemburg's labour legislation offered workers better conditions than those decided in the PWD. The European Commission was of the opinion that Luxembourg´s labour legislation transposing the PWD was not in line with the PWD and started an action against Luxembourg before the CJEU under the infringement procedure.

The Court agreed with the Commission and the Advocate General and ruled that the way in which Luxembourg had implemented the PWD was at odds with the freedom to provide service. By making reference to Omega[477], the Court held that " while the Member States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context, particularly when it is cited as justification for a derogation from the fundamental principle of the

[476] CJEU Case C- 319/06, Commission vs. Grand Duchy of Luxembourg.
[477] CJEU, Case C-36/02 *Omega* [2004] ECR I-9609, para 30.

freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society"[478].

From this it can be concluded that the CJEU grants Member States a margin of discretion in the field of public policy, which however must withstand limits imposed by the Treaty and associated with that is subject to judicial review by the Court. It also follows from the judgment that it belongs to task of the Member State to prove the facts which gives ground to justify a derogation from the freedom to provide service. But in the view of the CJEU Luxembourg could not satisfy that burden of proof as it failed to provide appropriate evidence which allowed to make a necessity and proportionality test of the relevant measures in question. The Grand Duchy of Luxembourg only had cited in a general manner the objectives of protecting the purchasing power of workers and good labor relations without indicating evidence to allow a necessity and proportionality test of the measures adopted[479].

3.7. Analysis of the Cases

It was shown, that the CJEU applied the precept of rule and exception and associated therewith the principle of proportionality in a very restrictive way. This has far reaching consequences for the social models of the Member States. In regard of the scope of application of EU law, it is interesting to see that the Court rejected in Viking and Laval the argument of the relevant Member States where after labor law felt outside the scope of EU law. The Court has not considered the intention of the Member States to exclude certain areas of their national social models form the scope of application of EU law which is reflected in Article 153 V TFEU. Joerges puts it in a nutshell :"The limitation of European competences in the area of social policy and labor law cannot be interpreted as an empowerment of European institutions to subject these fields to the discipline of Community principles and to

[478] CJEU, Commission vs. Grand Duchy of Luxemburg, para 50.
[479] CJEU, Commission vs. Grand Duchy of Luxemburg, para 53.

overrule conflicting national legal traditions. The uniqueness of labour law, the social and economic constitution is an indispensable dimension of democratic orders. Interventions in constitutional accomplishments of such dimensions cannot be based upon supremacy which European law grants to economic freedoms"[480].

To continue, the Court has interpreted in all four cases the fundamental market freedoms not on the basis of the prohibition of discrimination but prohibition of restriction approach. It is due to this that the precept of rule and exception found application which resulted in the fact, that the social was put automatically on the back- foot [481]. If the Court applied the non discrimination approach, it must have rejected a breach of Community law in all four cases[482]. The Court was also very restrictive in allowing derogations from the fundamental freedoms. In any of these cases the relevant Member State succeeded to assert against the fundamental market freedoms. . In Rüffert and Luxemburg, for example, the Court has not even accepted a justification of a restriction. This has mainly to do with the fact that the minimum social protection provided by the PWD has been interpreted by the Court as a maximum. In Viking but also in Laval, the Court did not accept the right to strike as an self standing rule of reason but subsumed it under the protection of workers. This does not sufficiently reflect the nature of a fundamental right.

In regard of the application of the principle of proportionality it can be concluded that due to its restrictive reasoning the Court in Rüffert and Luxemburg did not carry out a proportionality test. Germany and Luxemburg respectively, could not discharge the burden of proof for justifying the derogation from the relevant fundamental market freedoms. This also shows that it is a rather challenging enterprise to meet the burden of proof as required form the CJEU. Moreover, also the application of the principle of proportionality in Viking and Laval itself is disappointing. As Barnard states correctly, the Court conducted balancing only in name but not in substance[483]. The opposing interests have not been balanced at all, as the

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[480] Christian Joerges Rechtsstaat and Soccial Europe: How a Classical Tension Resurfaces in the European Integration Process, Comparative Sociology 9 (2010) 65-85(76).
[481] Barnard 2008: 14.
[482] See for this Lukas Oberndörfer 2009, 49.
[483] Barnard 2008 :14.

Court did not proceed to the third step of the proportionality test where normally the balancing procedure takes place. The Court applied only a "least restrictive" proportionality test to the actions of the unions in Viking and Laval. This committed the courts to examine whether the unions had other means at their disposal which would have been less restrictive of the employer´s free movement rights."[484].The formula of the CJEU as developed in Schmidberger, which removed an hierarchical scale regarding fundamental rights and fundamental freedoms was not applied in Viking and Laval. This suggests that the balancing outcome depends on the nature of the right and on the impact to the internal market[485]. It can be implied from this, that, according to the CJEU, a political fundamental right is likely to have less detrimental effects on the functioning of the European market than social fundamental rights.

The Laval quartet must also be seen in relation with the EU enlargement to the east and associated therewith, with an extension of the internal market. Joerges speaks in so far from a new socio-economic diversity in the Union consisting of the old Member States with high wage levels and the new Member States with low wage levels, seeking access in the labour market of the old Member States[486]. In making it for the new Member States possible to enter the European labour market, the Court has enforced a market liberal vision through the concept of negative integration. As regards this subject, the Laval quartet can be seen as a revival of the concept of ordoliberalism[487]. The yardstick of the CJEU to allow derogations from fundamental market freedoms is similar to the one of the Freiburg School, namely the criterion of market-conformity. In the Laval quartet the CJEU has eliminated market access barriers as these were regarded as not market conform. Also Catherine Barnard sees things similar. For her, the Laval quartet is attributable to the market access approach of the CJEU. She states that "according to the Court, employment rules of the host

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[484] Acl Davies, The Court of Justice as a Labour Court, Cambridge yearbook of European legal studies, Volume 14, 2011-2012 , pp. 145-175.
[485] Constantinos Combos, The Esoteric Dimension of Constitutional Pluralism: EU´s Internal Constitutional Sub-units and the Non -symbolic Cumulative Constitution
[486] Joeges/Roedl On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the “Social Deficit” of the European Integration Project. Reflections after the Judgments of the ECJ in Viking and Laval, 2010, 14.
[487] Joerges, Das soziale Defizit des Europäische Integrationsprojekts 2008, 6.

state can interfere with an entrepreneur´s access to the market in that state, those rules constitute a restriction on free movement and are unlawful unless justified and proportionate"[488]. Simon Deakin on the other hand sees in Viking and Laval a shift from ordoliberalism towards neoliberalism[489]. He states that: "The logic of Viking and Laval runs contrary to ordoliberal origins. It is consistent on the other hand, with what may be called a neoclassical interpretation of the EU´s economic constitution. Neoclassical models of the law-economy relationship see markets as essentially self-equilibrating. They share with ordoliberalism a distrust of direct state intervention in the economy, but they go further in denying that legal regulation is necessary to create the conditions for effective competition. While opposing extensive antitrust law interventions as unnecessary, neoclassical approaches nevertheless view labour law rules and collective bargaining practices as inherently inefficient. Thus, in the neoclassical approach, a principle role of the courts is to remove, through deregulation, legislative interventions, which may have arisen in the past on the basis of what are seen as misguided notions of social justice, and to deploy the power of the legal system to break up collusive arrangements through which private actors seek to capture the surplus(rents) generated by the productive process. According to this logic, few protective rules are required for labour law markets to operate: rules against forced labour by ruling out the institution of slavery and requiring "free" contracting- provide one example"[490].

To conclude, the CJEU gave with its rulings in the Laval quartet priority to further deregulate the labour market and to dismantle the European social model. With this line of reasoning, the Court encourages social dumping and system competition between the Member States. Accordingly, there is pressure for the high-wage Member States to take measures to address the risk of a downward spiral of social standards, as there is no harmonized level of worker protection on EU level. As regards this subject, the Member States were able to take adequate measures to respond to the situation brought

[488] Catherine Barnard, A proportionate Response to Proportionality in the Field of Collective Action, 2012, 119.
[489] Simon Deakin, In Search for the Social Market Economy, 2012,29.
[490] Simon Deakin, In search for the Social Market Economy, 2012,29.

about by the rulings of the CJEU in the Laval quartet[491]. This shows, that the Member States "still" have considerable autonomy in the formulation and application of social policy to combat negative integration.

4. Case Law of the CJEU in the Post-Lisbon Era

The Lisbon Treaty brings up the question in how far the reasoning of the CJEU in comparison to the pre- Lisbon era has changed. As regards this subject, the Court has so far only handed down two judgments with relevance to the social market economy and its impact on the European economic constitution. The first case, Santos Palotha, concerned the issues discussed in the posting of workers cases Laval, Rüffert and Luxemburg. In Commission vs. Germany the Court had to deal with a conflict between public procurement law and a German collective agreement. Both cases are characterized by the fact, that the opinions of Advocate Generals differ from the judgments of the Court to the extent that the former have given the social innovations brought about by Lisbon more attention than the latter.

4.1. Case C-515/08 Santos Palhota and Others[492]

4.1.1. Factual and Legal Background[493]

The Portugese company Termiso Limitada posted workers from its workforce in Portugal to Belgium to execute subcontracts at the shipyard belonging to Antwerp Ship Repair in Antwerp. Belgium introduced for the implementation of the PWD a so called simplified regime concerning the keeping of social documents by undertakings posting workers to Belgium. This simplified regime provided that employers in the first six months of posting were relieved from the requirement of drawing up and keeping social documents if employers sent the Belgian authorities a declaration of posting ('the prior declaration of posting'), before the relevant employees started to work. The Belgian authorities had to certify receipt and approval of the declaration within five working days of the date on which it was received and to send a registration number to the employer who could begin to employ the

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491 See for this Deakin/ Rogowski 2011, 247; Bücker/Warneck, Viking-Laval-Rüffert: Consequences and policy perspectives, 2010

492 CJEU Case C- 515/08 Santos Palotha 2010 ECR I-000.

493 See for the following: Dagilyte, Social Values in the European Union: Are they becoming more important after the Lisbon Treaty? Some Comments on C- 515/08 Santos Palotha and Others (2010).

workers only after the date on which the registration number was notified. In the case of non-compliance with this procedure the employer was not entitled to the dispensation from drawing up and keeping social documents provided for under the simplified regime. Furthermore, employers had to provide the Belgian authorities with copies of documents equivalent to the individual account or to the pay slip. The copies of the relevant documents had to be kept available to the designated inspection services for the period of six months. Furthermore, the copies had to be kept either at the workplace to which the worker was assigned in Belgium or at the Belgian address of a natural person who retained them as an agent or servant of the employer. In case of non-compliance with that obligation, employers had to draw up and complete the individual account and pay slip on the basis of Belgian law.

During an inspection carried out by the Belgian authorities it turned out that the mandatory prior declaration of the posting of workers to the Belgian authorities on behalf of Termiso Limitada did not take place. In addition, 53 posted workers belonging to Termiso Limitada were not in possession of the required social documents. Moreover, Termiso´s foreman could not provide the Employment Inspectorate with evidence in the form of pay slips of the posted workers. As a result of that charged Belgium Termiso Limitada for having failed to comply with the conditions laid down in Belgian legislation. Termiso Limitada challenged the validity of the relevant Belgian law on the basis of the freedom to provide service. The Court of First Instance of the judicial district of Antwerp, ‘the Rechtbank’ with which the appeal was lodged, asked the CJEU to clarify whether the Belgian law in question may be interpreted as compatible with Article 5 of Directive 96/71/EC concerning the posting of workers and with Articles 56 and 57 TFEU.

4.1.2. Opinion of the Advocate General

To begin with, the AG drew attention to the ongoing controversy brought about by the Viking quartet by stating that "this case brings to light once again the inherent tension between the construction of the internal market and the protection of social values"[494]. He proceeded to state that the rules laid down in the PWD were complemented with a national set of rules to give the PWD effect[495]. He added, that these national rules in the present case were not covered by Article 5 of the PWD which accordingly resulted in the fact that the relevant national rules were to be assessed on the basis of Article 56 TFEU. AG Villalon stated that this approach reflected the current line of reasoning of the CJEU and referred to the posted workers case law of the Court in Laval, Rüffert and Luxemburg[496].

The Advocate General then delivered an innovative approach concerning the relation between the economic and social dimension of the Union´s internal market. He acknowledged the valorization of the social dimension of the internal market by stating that with the coming into force of the Lisbon Treaty

> "[i]t has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms. Specifically, the posting of workers, in so far as it may alter the amplitude of the freedom to provide services, must be interpreted in the light of the social provisions introduced by that Treaty. Article 9 TFEU lays down a 'cross-cutting' social protection clause obliging the institutions 'to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.' That requirement is laid down following the declaration in Article 3(3) TEU that the construction of the internal market is to be realised by means of policies based on 'a highly competitive social market economy,

494 Opinion AG Villalon para 38.
495 Opinion AG Villalon, Palotha, para 42.
496 Opinion AG Villalon, Palotha, para 44.

> aiming at full employment and social progress[497]'.That social obligation is reflected even more clearly in Article 31 of the Charter of Fundamental Rights, a text that is now part of primary European Union law, which provides that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity.' Among those conditions, provision is made for a guarantee relating to working hours, rest periods and paid leave, which is illustrative albeit not exhaustively, of a minimum framework for the protection of workers[498].

The Advocate General thus explicitly refers to the horizontal social clause, the objective of the social market economy and to Article 31 CFREU as innovations to the substantive content of EU law. Yet, he did not stop at this statement, but intimated how this development had to be reflected in the case law of the CJEU:

> "As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality[499]". Thus, in order for the employment measures in issue in the host Member State to be justified in the terms set out above, they must be suitable for ensuring the attainment of the objective they pursue and must not go beyond what is necessary to

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[497]Opinion AG Villalon, Palotha, para 51.
[498]Opinion AG Villalon, Palotha, para 52.
[499] Opinion AG Villalon, Palotha, para 53.

> achieve that objective. This criterion of proportionality, which the Court has consistently applied in its case-law on the fundamental freedoms, is usually described as the appropriateness test and the necessity test, respectively. It is, therefore, necessary to determine whether the disputed measures constitute a restriction of freedom to provide services and, then, if the reply is affirmative, to assess whether those measures are justified by reviewing their proportionality. This analysis must be performed in an individualised manner, examining every measure concerned separately and in the light of a standard of review which, in accordance with the Treaty, is to be particularly sensitive to the social protection of workers.

As regards the proportionality of the Belgian rules the Advocate General found the declaration prior to the posting suitable but not necessary. According to him, the time limit of five days within which the Belgian authorities must acknowledge receipt and issue a registration number was not necessary since less restrictive means were available. He proposed as an alternative method a so called system of positive silence whereby a registration number would be presumed to have been issued if the authorities failed to reply within the time-limit[500].As regards the requirement of keeping the documents the AG came to the conclusion that this was suitable but only partially necessary[501]. The documents were suitable for the purposes of determining the financial rights of workers as they made it possible to monitor whether the legally prescribed wages were paid. But he found the extension of the obligation to keep the documents for up to five years after the expiry of the period of six months since the worker was first posted not necessary as there were less restrictive measures available.

4.1.3. Judgment of the CJEU

The CJEU followed the proposal of Advocate General Villalon. The Court assessed the compatibility of the relevant Belgian law on the basis of Articles 56 and 57 TFEU and not on Article 5 of Directive 96/71.

As regards the registration and notification procedure the CJEU stated that this constituted not merely a declaratory procedure, but an

[500] Opinion AG Villalon, Palotha, para. 76.
[501] Opinion AG Villalon, Palotha, para. 90-92.

administrative authorisation procedure which was likely to constitute a restriction on the freedom to provide service within the meaning of Article 56 TFEU. With reference to the requirement to keep certain social labour documents the Court was of the opinion that "it could not be ruled out at the outset that those obligations give rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings may not be on an equal footing, from the standpoint of competition, with undertakings employing persons normally working in Belgium".

The Court then proceeded and examined whether the restrictions to the freedom to provide service were justified. The Court emphasized that according to settled case law a national legislation which restricted the freedom to provide service was justified, if it constituted an overriding requirement relating to the public interest and was appropriate for securing the attainment of the objective which it pursued and did not go beyond what was necessary in order to attain it[502]. The Court made clear that the simplified regime in the present case served the purpose to monitor compliance by employers posting workers to Belgium with the terms and conditions of employment set out in Article 3(1) of the PWD. Thus in the point of view of the Court the simplified regime pursued the public interest objective of the social protection of workers. This constituted an overriding reason relating to the public interest capable of justifying a restriction on the freedom to provide service[503]. According to the Court, it was therefore necessary to assess whether the relevant measures belonging to the simplified regime were appropriate for attaining the objective of protecting workers and did not go beyond what is necessary in order to attain that objective. The Court considered the prior declaration as a suitable means to achieve the attained goal of the social protection of workers. However, it found that the administrative authorisation procedure went beyond what was necessary in order to ensure that posted workers were protected. The CJEU was of the opinion that there was a less restrictive way for the employer at hand, namely to report beforehand to the local authorities on the presence of

[502]CJEU, Palotha para. 44.
[503]CJEU, Palotha, para 46-47.

one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment.

As regards the requirement to keep certain social documents the Court considered this measure as appropriate to allow the authorities to supervise compliance with the terms and conditions of employment of posted workers as set out in Article 3(1) of Directive 96/71but also to ensure that the workers are protected.[504] As regards the necessity of the relevant Belgian regulation the Court stated that "keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State constitutes a less restrictive means of ensuring the social protection of workers than drawing up documents complying with the rules of that Member State.

4.1.4. Analysis of the Case

This case is particularly striking because of the innovative approach taken by the Advocate General as regards the reconciliation of the economic and the social dimension of the internal market of the European Union. Vilallon addressed the valorization of the social dimension in the EU by making reference to the horizontal social clause, the social market economy and Article 31 CFREU. He is of the opinion that due to the valorization of the social dimension the protection of workers did not constitute an exception anymore. The message of the Advocate General is clear: he calls for a strengthening of the autonomy of the Member States in their social policies. Unfortunately the AG left it in addressing the horizontal social clause and the social market economy but did not go in further detail to specify these novelties of the Lisbon Treaty. By contrast, the CJEU was very reluctant to take account of the new legal situation brought about by the Lisbon Treaty. The Court did not mention any of the social novelties in its reasoning. As regards the application of the principle of proportionality everything has remained the way it was. The Advocate General but also the CJEU applied a least restrictive approach to the principle of proportionality and thus did not apply the proportionality test in the narrow sense. The Advocate General also based the principle of proportionality on the precept of rule and exception.

[504]CJEU, Santos Palotha, para 57.

This rule-exception relationship reflects the strong standing of fundamental market freedoms as subjective negative rights. Both, the Court and the Advocate General have based their reasoning on the precept of rule and exception in which the freedom to provide service constitutes the rule and the relevant Belgian social law an exception requiring justification. In regard of the justification of restriction, the AG refers to working conditions as an overriding reason relating to the public interest. It is disappointing that the AG only mentioned Article 31 CFREU but did not apply it as a self standing justification ground. The CJEU, unlike the Advocate General did not even refer to Article 31of the CFREU for justifying the derogation from the freedom to provide service, but the Belgian law in question pursued in the view of the Court "only" the social protection of workers.

4.2. Commission vs. Germany[505]

4.2.1. Factual and Legal Background[506]

Local authorities and local authority undertakings in Germany had awarded service contracts in respect of occupational old-age pensions to bodies and insurance companies referred to in Paragraph 6 of the Collective agreement on the conversion for local authority employees of earnings into pension savings (*Tarifvertrag zur Entgeltungwandlung für Arbeitnehmer im kommunalen öffentlichen Dienst; 'hereinafter TV-EUmw/VKA'*),) without issuing a call for tender at the EU level. The Commission launched an infringement proceeding against Germany arguing that Germany had failed to fulfill its duties resulting from Article 8 in conjunction with Titles III to VI of Council Directive 92/50 EEC[507], and since 1 February 2006 Article 20 in conjunction with Articles 23-55 of Directive 2004/18 EC[508]. Germany submitted four grounds to justify the preliminary selection of pension scheme providers, namely more transparency in the selection of pension scheme

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505 CJEU, Case C- 271/08Commission vs. Germany 2010, ECR I-000.

506 For a summary of the case see Bücker, Hauer, Walter, Workers´rights and economic freedoms: symphony or cacophony? A critical analysis from a German perspective,2011.

507 Council Directive 92/50 EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts , OJ 1992 L 209, p.1.

508 Directive 2004/18 EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.

providers, greater acceptance amongst workers as a result of the participation of worker representatives in the preliminary selection in favour of certain pension scheme providers, the greater expertise of the parties involved in negotiating the collective agreement and particular characteristics of the chosen pension scheme providers[509]. The CJEU, therefore, had to deal with the question whether service contracts conducted between public authorities and insurance companies serving the aim of converting earnings into pension savings had to be classified as public contracts falling under the scope of public procurement law.

4.2.2. Opinion of the Advocate General

Advocate General Trstenjak first dealt with the claim of Germany whereupon collective agreements were excluded from the scope of application of European competition law. Germany had referred to the judgments of the CJEU in the cases Albany and Van der Woude and argued that the exception in the field of competition law could also be applied in relation to fundamental freedoms and, as a result, collectively agreed framework agreements were excluded from the scope of fundamental freedoms. The AG did not accept the argument of Germany but made it clear that both, the competition rules and the fundamental market freedoms have the objective of completing the internal market. The fact that an agreement or activity was excluded from the scope of the competition rules did not necessarily mean that it was also excluded from the scope of the rules on freedom of movement. The AG made clear that the CJEU in Viking[510] hold that "an agreement or an activity may be included within the scope of the provisions on free movement, at the same time it may fall outside the scope of the provisions on competition and vice versa" [511]. She concluded from this that there was no "mandatory concordance between the scope of the competition rules under primary law and that of the fundamental freedoms"[512].

The Advocate General then continued to state that in the present case there was a asymmetrical collision between the fundamental right of freedom of coalition and collective bargaining, on the one hand ,and the Directives

[509] AG Trsteniak, Commission vs. Germany, para. 220.
[510] CJEU Viking para 53.
[511] AG Trsteniak, Commission vs. Germany, para. 66.
[512] AG Trsteniak, Commission vs. Germany, para. 67.

92/50 and 2004/18 on the other, which gave effect to the freedom of establishment and the freedom to provide service. The resolution of this conflict required first to transpose this conflict into a symmetrical collision at a primary law level and treating the conflict as one between the freedom of coalition and collective bargaining on the one hand and the freedom of establishment and freedom to provide service on the other. Subsequently, that resolution achieved at a primary law level must be implemented at the level of secondary law through an interpretation of the procurement directives in accordance with primary law[513].

The Advocate General then went on and dealt in detail with the resolution of collisions between fundamental market freedoms and fundamental rights. In doing so she first referred to the judgments of the CJEU in Viking and Laval. According to her, the Court established a hierarchy between fundamental freedoms and fundamental social rights by characterizing the freedom of coalition as a mere overriding reason of the public interest instead of a fundamental right. According to her, there was no hierarchical relationship between fundamental market freedoms and fundamental rights, on the contrary, both legal positions had equal status[514]. She stated that:

> "The approach adopted in Viking Line and Laval un Partneri, according to which Community fundamental social rights as such may not justify- having due regard to the principle of proportionality - a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sit uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms".

Departing from this assumption she went on and made clear how the equal ranking of fundamental freedoms and fundamental social rights in the present case must be reflected in the case law of the Court[515]:

> Therefore, if in an individual case, as a result of exercising a fundamental right, a fundamental freedom is restricted, a fair balance

[513]AG Trsteniak, Commission vs. Germany, para 176-177.
[514]AG Trsteniak, Commission vs. Germany, para 81.
[515]AG Trstenjak, Commission vs Germany, para 188-190.

between both of those legal positions must be sought. In that regard, it must be presumed that the realization of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realization of a fundamental right must be recognized also as a legitimate objective which may restrict a fundamental freedom.

For the purposes of drawing an exact boundary between fundamental freedoms and fundamental rights, the principle of proportionality is of particular importance. In that context, for the purposes of evaluating proportionality, in particular, a three-stage scheme of analysis must be deployed where (1) the appropriateness, (2) the necessity and (3) the reasonableness of the measure in question must be reviewed.

A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom".

From this approach the difference of characterizing the freedom of coalition as a self standing rule of reason and not merely as an overriding public interest can be clearly seen. According to this approach a one sided precept of rule and exception in which the realization of the freedom of coalition must justify a derogation from a fundamental freedom finds no application. On the contrary, according to the Advocate General both, fundamental freedoms and fundamental rights can restrict each other. Accordingly, fundamental freedoms might be restricted in the interest of fundamental rights but also vice versa, the exercise of fundamental freedoms might justify a restriction on fundamental rights. In stating that, the AG leant on the Schmidberger case of the CJEU, in which as is well known the Court not only balanced the

contradicting fundamental rights in the relevant case but went even further to reconcile them.

According to Trstenjak, the present conflict between Directives 92/50 and 2004/18 on the one hand and the fundamental rights to bargain collectively and to autonomy in collective bargaining on the other must be resolved on the basis of the principle of proportionality. She proposed the following innovative approach:

> "The assessment of whether freedom of establishment and freedom to provide services may justify a restriction on the fundamental rights to bargain collectively and to autonomy in collective bargaining constitutes, ultimately, the mirror image of the assessment of whether those fundamental social rights may justify a restriction on freedom of establishment and freedom to provide services. As the latter option for analysis facilitates a thorough evaluation of the arguments advanced by the German Government, in the following section I will examine whether for the attainment of the objectives pursued by the fundamental rights to bargain collectively and to autonomy in collective bargaining it was necessary to restrict fundamental freedoms in the manner contested by the Commission[516].
>
> Thus, having regard to the principle of proportionality, the restriction on freedom of establishment and freedom to provide services arising as a result of the preliminary selection in Paragraph 6 of the TV EUmw/VKA in favour of certain pension scheme providers would have to be considered justified by the fundamental rights to bargain collectively and to autonomy in collective bargaining, if that preliminary selection of pension scheme providers was appropriate and necessary to permit voluntary and independent negotiations on terms and conditions of employment with a view to the conclusion of a collective agreement and the infringement of fundamental freedoms
>
> thereby occasioned was proportionate to the attainment of those objectives[517]

This approach is insofar remarkable as the Advocate General did not assess whether the restriction of fundamental freedoms in the present case was

[516] AG Trstenjak, Commission vs. Germany, para 204.
[517] AG Trstenjak, Commission vs. Germany, para 206.

justified, but whether the German regulation justified a restriction of the fundamental freedoms.

Trstenjak found that the preliminary selection in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme provider was a suitable measure to ensure the attainment of the interests protected by the fundamental rights to bargain collectively and to autonomy in collective bargaining[518]. However, a preliminary selection of pension scheme providers was in her point of view not necessary since an implementation measure conforming more closely to Community law could have been achieved[519]. According to the AG it was possible " to conceive of an alternative scheme compliant with Community law in which, within the framework of the implementation methods provided for the BetrAVG, conversion of earnings would have to be implemented through one or more pension scheme providers selected by local authority employers in accordance with the primary law obligation of transparency or, where the conditions for their application are satisfied, with the procurement law directives."[520]

The Advocate General answered the question of the proportionality in the narrow sense of the German regulation in the negative. According to her, the requirements included in Paragraph 6 of the TV-EUmw/VKA constituted only technical implementing provisions and did not refer to terms and conditions of employment. As a matter of fact, the fundamental right to bargain collectively was not affected. To the same time, however Paragraph 6 of the TV-EUmw/VKA had the effect to exclude the requirements resulting from the principles of freedom of establishment and freedom to provide service. Accordingly, she found that the restriction of the fundamental freedoms resulting from Paragraph 6 of the TV-EUmw/VKA must be categorized as unreasonable.

As a result, the Advocate General came to the conclusion that the fundamental rights to bargain collectively and to autonomy in collective bargaining was incapable of justifying the restriction on freedom of establishment and freedom to provide services resulting from the preliminary selection adopted by the social partners in Paragraph 6 of the TV-

[518] AG Trsteniak, Commission vs. Germany, para 208.
[519] AG Trsteniak, Commission vs. Germany, para 212.
[520] AG Trsteniak, Commission vs. Germany, para 215.

EUmw/VKA in favour of certain pension scheme providers because such restriction was not proportionate.

4.2.3. Judgment of the Court

The judgment of the Court is in comparison to the opinion of Advocate General Trstenjak less promising. The CJEU ruled that Germany, in the present case, had failed to fulfill its obligations resulting from secondary procurement law.

The Court first pointed out that the award of contracts to bodies and insurance companies referred to in Paragraph 6 TV-EUmw/VKA did not fall outside the scope of application of Directives 92/50 and 2004/18. The Court first made it clear that the collective agreement TV-EUmw/VKA had a social objective and was as such covered by the fundamental right to bargain collectively. Like in Viking and Laval the CJEU acknowledged the fundamental right status of the right to bargain collectively, in particular by making reference to Article 6 ESC, Article 28 CFREU and Article 12 of the Community Charter of the Fundamental Social Rights of Workers . The Court then went on to state that this however could not be understood to mean that local authority employers were automatically excluded from the obligation to comply with the requirements stemming from Directives 92/50 and 2004/18, which implement freedom of establishment and the freedom to provide services in the field of public procurement"[521]. Other than in Albany[522] and van der Woude[523] and in accordance with its reasoning in Viking the Court agreed with the opinion of the Advocate General Trstenjak and stated that the relevant collective agreement did not fall outside the scope of European law[524].

The Court proceeded and made it clear that the right to bargain collectively was not absolute and accordingly could be restricted. The CJEU stated that the right to bargain collectively had to be "exercised in line with European Union law[525]". This is exactly what the Court stated in Viking and Laval. The Court then continued and stated that it was necessary to reconcile

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[521] Case Commission vs. Germany, para 41.
[522] Case C-67/96 *Albany* [1999] ECR I-5751.
[523] Case C-222/98 *van der Woude* [2000] ECR I-7111.
[524] See CJEU, Viking, para 53.
[525] CJEU,Commission vs. Germany, para 43.

the exercise of the fundamental right to bargain collectively with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 were intended to implement, and be in accordance with the principle of proportionality"[526].

The Court proceeded and made clear how this reconciliation must look like. It stated that "it must therefore be examined whether the contract awards at issue fall within the conditions for application of Directives 92/50 and 2004/18"[527]. In regard of the reconciliation of the conflicting interests the Court again applied the exception to the rule principle and assessed on the basis of the principle of proportionality in how far a derogation from Directives 92/50 and 2004/18, which implement freedom of establishment and the freedom to provide services in the field of public procurement due to the fundamental right to bargain collectively was in compliance with EU law. From this approach it becomes clear that the fundamental right to bargain collectively is still subject to the fundamental market freedoms. But, in the following, the Court did not employ an usual proportionality test to balance the conflicting interests at stake. Rather, the CJEU stated that it was "possible to reconcile the application of the procurement procedures with the application of mechanisms, stemming, in particular, from German social law, which ensure that workers or their representatives participate, in the local authority or the local authority undertaking concerned, in the taking of the decision concerning selection of the body or bodies to which implementation of the salary conversion measure will be entrusted"[528].

The approach of the Court to resolve the conflict in the present case is promising when comparing it with the line of reasoning in Viking or Laval. The CJEU first declared the call for tender as compulsory in order to address the concerns of the parties to the collective agreement in the present case, namely to guarantee local authority employees a safe and secure pension and thus to achieve the envisaged objective of the salary conversion. By doing so the Court aimed to make sure that public authorities not only chose one partner which secures the pensions of the local authority employees, but issue before a public tender at European level and select from among

[526]CJEU,Commission vs. Germany, para 44; see also CJEU, Viking Line, para 46; CJEU, Laval, para 94.
[527]CJEU,Commission vs. Germany, para 67.
[528]CJEU,Commission vs. Germany, para 55.

several tenders. This has the effect that social partners are no longer able to choose their financial partners for converting earnings into pensions savings without a call for tender. However, the CJEU did not touch upon the very essence of the fundamental right to bargain collectively. The social partners are still allowed to determine the content of the collective agreements and thus to make use of their right to bargain collectively. Furthermore, the social partners are still entitled to guarantee local authority employees a safe and secure pension and thus to achieve the objective envisaged in the collective agreement, namely the conversion of earnings into pension savings. The Court further pointed out that local authority employers could specify in the terms of the call for tenders, the conditions to be complied with by the tenders. In this way the essence of the right to bargain collectively was in the point of view of the Court not limited.

4.2.4. Analysis of the Case

This case is significant due to the approach of the Advocate General to reconcile the social and the economic dimension of the internal market and shows how a future reorientation of the CJEU could look like. Trstenjak provides clarification on how collisions of fundamental rights have to be resolved. Although she gives rules on European procurement law priority over national labour law, the approach is very promising. Her approach eliminates the hierarchy found in Viking and Laval between fundamental market freedoms and fundamental social rights. The parity of economic and social rights is reflected in the fact that she does not apply a one sided precept of rule and exception for the resolution of the conflict. Furthermore, she applies a three step proportionality test. Furthermore, She did not only balance the conflicting interests, but also reconciled the conflicting rights at stake. The CJEU on the other hand has maintained the precept of rule and exception between the market freedoms and social state interventions. However, the reasoning of the CJEU reveals that it engaged not only to balance the conflicting interests at stake, but also to reconcile them to a certain extend. But this should not obscure the fact that the both, the CJEU and the Advocate General gave the European procurement rules priority over

the fundamental right to free collective bargaining as the margin of freedom for negotiations and collective bargaining was narrowed down.

5. Interim conclusion

It can be concluded from these two cases that the move from the open market economy towards the social market economy as an objective of the EU has so far not created a new situation as compared to the reconciliation of fundamental market freedoms and fundamental social rights before 1 December 2009. In particular, the application of the precept of rule and exception as well as the principle of proportionality remained unchanged. Moreover, the valorization of the social dimension of the European Union has not been reflected in the legal reasoning of the Court. This could be interpreted as meaning that the move from the open market economy towards the social market economy has no implications on the Lisbon version of the European economic constitution. On the other hand, however, it might be argued that it is too early to give an final assessment on this question, since the Court has so far only handed down two rulings. This view finds support by the Opinions of the Advocate Generals in Palotha and Commission vs. Germany. As was shown, Villalon and Trstenjak have both taken the valorization of the social dimension more serious than the CJEU and showed that the Lisbon Treaty has the potential to bring about a social market economy in the sense of Article 3 III 2 TEU.

G. By Way of a Conclusion- What Future For The Social Market Economy?

It has been placed very great hopes in the Lisbon Treaty to move the social dimension of the internal market onwards. However, the expectations so far have not been met. A substantial change has not occurred so far. There is a discrepancy between the constitutional framework of the Lisbon Treaty and the judgments of the CJEU as the former is not reflected in the latter. Despite this fact, the social market economy in the sense of Article 3 III 2 TEU might have the potential to develop the social dimension of the EU internal market further. In accordance with the previous analysis it can be argued that the most appropriate way to realize the social market economy will be to limit the effects of negative integration by allowing the Member States more derogations form the fundamental market freedoms. As pointed out, the Member States have quite diverse national social models and associated therewith the socio-economic conditions are not the same. Against this background, it seems very unlikely to reach an unanimous decision in the Council to adopt new secondary law in the sense of the social market economy[529]. The Lisbon Treaty offers room for strengthening the autonomy of the Member States and their social models. Undeterred by the fact that the Member States have not regained new competences it is more likely than before that social state interventions of the Member States in future will comply with the values of the EU within an evolving social market economy"[530]. The further development of the social market economy depends very much on the legal reasoning of the CJEU as the guardian of the European economic constitution. In particular the social values of the EU but also the social fundamental rights of the CFREU are important means to combat negative integration and thus to bring about a social market economy. The CJEU is required to take the valorization of the social dimension into consideration when interpreting and applying EU law. As an institution of the European Union, also the CJEU has to contribute to achieve the goal of the social market economy. As was pointed out before, the open

[529] See for this Fritz Scharpf, Socio-Economic Review 8, 211-250 (2010).
[530] See for this, Malcom Ross , SSGIs and Solidarity: Constitutive Elements of the EU´s Social Market Economy? 2013, 98.

market economy according to the Nice Treaty found reflection in the fundamental market freedoms and the European competition rules as the backbone of the European economic constitution. Derogations from these rules were allowed on the basis of a strict precept of rule and exception. The logical consequence of replacing the "open" by a "social" market economy in Article 3 III 2 TEU must be to allow social derogations from these rules to a greater extent than this was the case before the 1st December 2009. The Advocate Generals in Santos Palotha and Commission vs. Germany respectively have already indicated where the valorization of the social dimension must find reflection, namely in the frame of justification of restrictions and the principle of proportionality respectively. This refers also the precept of rule and exception as applied by the CJEU since it is directly linked to the principle of proportionality. In the following, the potential for further development of the social market economy in the sense of Article 3 III 2 TEU will be illustrated.

1. Narrowing Down the Scope of Application of EU Law

The social market economy might have the effect to allow exclusions of certain areas of social policy from the scope of application of EU law and thus from the derivable rights of the European economic constitution[531]. This would give national policy makers more room for maneuver to solve the social question autonomously. In *Albany*[532] the CJEU has chosen exactly this way. This case concerned the relationship between the EC rules on competition in Article 101 TFEU ex Article 85(1) and collective agreement in the Netherlands negotiated between representatives of employers and employees concerning the set up of a pension fund system for workers in the textile sector. The question at stake was[533]: is Article 101 TFEU (ex Article 81(1) EC) infringed where representatives of employers and employees within a particular sector of the economy agree collectively to set up a single

[531]Azoulai is of the opinion that the exclusion of labour law from the scope of application of Community law would have the advantage of protecting the integrity of national social systems. On the other hand, however, it would "create the risk of appropriating forms of social action in order to avoid the applcation of the Treaty rules in transnational situations." See for this Azoulai 2008,1353; Catherine Barnard , Free Movement and Labour Rights: Squaring the Circle, 2013.
[532] CJEU Case C-67/96 Albany[1999] ECR I- 5751.
[533] CJEU, Albany , para 68.

sectoral pension fund with an exclusive right to administer the collected contributions and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector?"
The CJEU came to the following conclusion**:**

> It is beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment[534].
>
> It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101(1)][535].

Thus, the Court was of the opinion that competition law found no application, on condition that the aim of the collective agreement was to improve the conditions of work and employment. The Court applied the same line of reasoning in Van der Woude[536] when it stated that a collective agreement establishing a health care insurance scheme contributed to improving the working conditions of employees.

Albany has to be seen as one of the most important decisions of the CJEU in the field of labour law. However, when taking into consideration the recent case law of the CJEU, the probability that the court will follow the line of reasoning taken in Albany again, is low. In Viking, Laval, but also in Commission vs. Germany the Court has rejected an analogous application of the line of reasoning in Albany to the fundamental market freedoms and thus

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534 CJEU Albany, para 59.
535 CJEU Albany, para,60.
536 Case C- 222/98, Van der Woude v. Stichting Beatrixoord[2000] ECR I-7111.

has subordinated the national labour law regimes to the European economic constitution.

2. Widening the Justification of Restrictions

The constitutionalisation of the social market economy makes it necessary to reconsider the yardstick to allow interventions in the market process, too. As was shown, the yardstick used by the CJEU for assessing the justification of restrictions in the fundamental market freedoms are in general written and unwritten public interest concerns. As regards this subject, there are several considerations which have the potential to bring about a change of reasoning of the CJEU. The move from the open market economy towards the social market economy speaks in favor of allowing more justifications of restrictions of fundamental market freedoms but also European competition rules. As already pointed out, derogations from the derivable rights of the European economic constitution are allowed if public interest concerns have more weight than the fundamental market freedoms or the European competition rules. At first sight, the justification of a restriction looks like a conflict between supranational economic rights and non-economic national public interest concerns. But this is only half of the story. The internal market fulfills a double function as a public interest concern. On the one hand, it pursues the objective of the maximization of the overall welfare of the people. In this sense it constitutes a communitarian public interest concern. On the other hand, the internal market is based on the fundamental market freedoms and the European competition rules, and thus serves individual interests. Moreover, the public interest concerns of Member States to derogate from the fundamental freedoms must in any case comply with the public interest concerns of the EU. Therefore, in a conflict between fundamental market freedoms and social state interventions, the CJEU not only has to find a balance between the public interest of the EU and the Member States, but also between the interest of the individual in being protected by the European economic constitution and the public interest concern of the Member State. The move from the open market economy towards a social market economy suggest to give in this situation more attention to the social public interest concerns of the Member State as

before. This view is supported by the social values of the European Union, the fundamental social rights but also by the many social objectives enshrined in Article 3 TEU.

A comparison of the Rüffert judgment of the CJEU with the judgment of the BVerfG in the *Collective Agreement Compliance Clause* case[537] shall illustrate how the interpretation of the internal market in the light of the social market economy could look like[538]. As was shown, the facts of these cases are almost identical. Both cases concerned the legality of a collective agreement compliance clause. The BVerfG assessed the constitutionality of the compliance clause on the basis of Article 12 I GG, the freedom of occupation and the CJEU on Article 56 TFEU(ex Article 49 EC). Both provisions are part of the relevant economic constitution and give employers the right to freely negotiate employment conditions with employees. Similar to Article 12 I GG , Art. 56 TFEU is a right guaranteeing freedom from state intervention. However, in regard of the provided justification of restriction, the line of reasoning of the CJEU and the BVerfG differs essentially. Thus, the BVerfG took the view that the legislators aim of adopting the compliance clause was constiutionally unobjectionable as it served the common good. The BVerfG concretized the common good as follows: the protection of employers paying standard wages against any disadvantages resulting from competition with employers not paying such wages, fighting unemployment and maintaining social standards, financial stability of the social security system and support of a system of autonomous regulation of the labour market. The legislator could invoke the social state principle, human dignity and the freedom of self development to restrict Article 12 I GG. In contrast, the CJEU did not accept any of the concerns of the common good mentioned by the BVerfG. By applying the market access approach the CJEU did neither pay attention to the constitutional status of the objective to fight unemployment nor to the discretion and responsibility of the German legislator to regulate the economy. Moreover, also the aim of the compliance clause to support the system of autonomous regulation of the labour market found no consideration. The reasoning of the BVerfG in this case shows clear, how an internal market interpreted in the light of a social market

[537] See Case 6.
[538] see for the following Bücker/Warneck 2011, 323.

economy could look like. In future cases the CJEU should acknowledge the new framework brought about by the Lisbon Treaty. Against the background of the valorization of the social dimension of the EU, the social public interest concerns of the Member States are now more likely to comply with the European public interest concerns. It is now the task of the CJEU to take the social dimension of the internal market into consideration when interpreting and applying EU law and thus to extend the reasons for justifying restrictions of fundamental market freedoms[539].

3. Invocation of Fundamental Social Rights in the European Multilevel Governance System

One effective way to combat the detrimental effects of negative integration and associated therewith to realize the social market economy in the sense of Article 3 III 2 TEU is the invocation of social fundamental rights in the European multilevel governance system. The legally binding CFREU makes it more difficult to argue that fundamental market freedoms enjoy priority over fundamental social rights, like the Court has decided in the Laval quartet. It is now more reasonable to argue that the relationship between them is on parity"[540]. As already mentioned, in the European multi-level governance system the protection of fundamental social rights consists of mutually dependent and interacting orders that together constitute one encompassing constitutional order, namely the CFREU, the ECHR – once the EU has acceded to it – and fundamental rights as general principles of law. At this point it is important to note, that all Member States of the EU are signatories to the ECHR, the (R)ESC as well as numerous ILO Conventions which results in the fact that the Member States are not only bound to apply fundamental rights$ belonging to the sphere of the EU but also to international standards belonging to the Council of Europe and the ILO. Moreover, it must be emphasized that according to Article 52 (3) CFREU the meaning and the scope of fundamental rights enshrined in the Charter shall be the same as those laid down by the ECHR. It shall be recalled that the primary objective of the EU is to promote its values and associated therewith

[539] See for this Bücker/Warneck 2011, 322.
[540] See also Deakin, 2012, 42.

human rights. The CFREU, the ECHR and the (R)ESC are such human rights instruments. In addition, the ILO takes the view that labour rights constitute human rights[541]. The ILO adopted in 1998 the Declaration of Fundamental Principles and Rights at Work[542]. The Member States of the ILO which are to the same time Member States of the EU are bound by the Declaration even if they have not ratified the relevant Conventions. The declaration covers four fundamental principles and rights at work, namely the freedom of association and the right to collective bargaining[543], the elimination of forced labour[544], the abolition of child labour [545]and equality of opportunity and treatment in employment[546]. The right to strike finds no explicit mentioning in the text of the Constitution of the ILO or in any other ILO conventions. However, it has been acknowledged in the case law developed by the ILO´s Freedom of Association Committee, interpreting Convention No. 87[547]**.** From this it becomes clear that there is an interaction between the different legal sources of the fundamental social rights in the European multilevel governance system. In the European multi-level governance system legal standards stem from distinct legal orders, namely the constitutional orders of the Member States, the European Union and the Council of Europe[548]. Each legal order defines its relations to other legal orders and the resulting hierarchies of legal orders can conflict. Potential clashes between legal orders might be softened if legal orders recognize the human rights instruments of other legal orders and more importantly, if these instruments are interpreted in accordance with the legal order from which they originate. A stronger dialogue between Courts belonging to different levels of governance might be an appropriate means of reconciling fundamental social rights and economic freedoms. Reference must be made

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541 Virgina Mantouvalou, Are Labour Rights Human Rights? 2012 http://www.ucl.ac.uk/laws/lri/papers/VMantouvalou_Are_labour_rights_human_rights.pdf.

542 http://www.ilo.org/declaration/lang--en/index.htm

543 ILO Convention No. 87 - Freedom of Association and Protection of the RIghtto Organize, ILO Convention No.98-Right to Organize and Collective Bargaining.

544 ILO Convention No. 29- Forced Labour, 1930, ILO Convention No. 105- Abolition of Forced Labour, 1957.

545 ILO Convention No. 138- Minimum Age Convention 1973; ILO Convention No. 182- Worst Forms of Child Labour.

546 ILO Convention No. 111- Discrimination (Employment and Occupation) 1958; ILO Convention No. 100- Equal Remuneration , 1951.

547 See for this: Catherine Barnard, A proportionate response to proportionality in the Field of Collective Action, European Law Review 37 , 2012, 119.

548 See for this Dorssemont, 2010, 12.

to the judgment of the ECtHR in the case *Demir and Baykara* where the ECtHR stated that in defining the meaning of the terms and notions of the ECHR, the Court can and must take into account elements of international law other than the ECHR, such as the ESC, the RESC or ILO Conventions and their interpretation[549]. This innovative approach of the ECtHR might also influence the interpretation of EU law for the benefit of social fundamental rights. Against the background of the foreseen accession of the EU to the ECHR the CJEU would be requested to interpret legal standards in accordance with the interpretation of the ECtHR. In addition, since the values of the EU are also addressed to the EU Member States, the CJEU would be required to take the membership of the Member States in other international organisations into consideration when interpreting and applying primary and secondary EU law. These prospects do have the potential to combat the detrimental effects of negative integration for the Member States.

4. Reforming the Application of the Principle of Proportionality

It was shown, that both, the CJEU and the BVerfG use the principle of proportionality to manage disputes involving an alleged conflict between two rights claims, or between a rights provision or private interest and a state/public interest. It should be noted, that the principle of proportionality and associated with that the balancing procedure is not uncontested[550]. The most outspoken critic has been Jürgen Habermas[551] who argues that the balancing procedure deprives constitutional rights of their normative power and downgrades them to the level of goals, policies and values[552] As a result of this, he argues, rights lose their "strict priority": "For if in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal

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549 European Court of Human RIghts, Demir and Baykara v. Turkey, no. 34503/97, rec. 85.; see also Bruun Niklas, Bücker Andreas, Dorssemont Filip, " Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma? ; The International Journal of Comparative Labour Law and Industrial Relations 28, no.3 (2012) 279- 306. (305).

550 E.-W. Boeckenfoerde 1991, Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grundrechtsdogmatik: in Staat, Verfassung, Demokratie

551 Jürgen Habermas 1996, Between Facts and Norms, trans. W Rehg(Cambridge, Mass., 1996)

552 Habermas 1996, 256.

norms and principles collapses[553]. Habermas further argues that there are no rational standards for balancing which increases the risk of irrational rulings.[554] "Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies".[555] Habermas´ view echos the liberal understanding of the concept of law as theorized by Ronald Dworkin[556]. In this concept, there is not room for weighting mechanisms like the one laid down in the proportionality principle[557]. According to Dworkin, individual rights as principles cannot be outweighed by politics.

The application of the principle of proportionality is also criticized by the trade union movement. As stated before, the Court was criticized in Viking and Laval for having carried out a proportionality test only in name but not in substance. It comes therefore as no surprise that after Viking and Laval the balancing of rights on the basis of the principle of proportionality particularly in industrial action cases has become highly disputed[558]. Exemplary, the European Trade Union Confederation(ETUC) is of the opinion, that the rights of trade unions and their members should enjoy priority over economic rights. Accordingly, in the "proposal for a social protocol" the ETUC calls for reversing the priority of right by stating that:

> "Nothing in the Treaty, and in particular neither fundamental freedoms nor competition rules shall have priority over fundamental social rights and social progress. In cases of conflict, fundamental social rights shall take precedence"[559].

The European Economic and Social Committee(EESC) shares the same view:

> "Regarding the principle of the equal value of fundamental social rights vis-à-vis economic freedoms, the EESC is of the opinion that primary law in particular must ensure this approach. The EESC notes that the third recital of the preamble, and specifically Article 151 of the

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553 Habermas 1996, 258.
554 Habermas 1996, 259.
555 Habermas 1996, 259.
556 See Ronald Dworkin, Taking Rights Seriously, 1977.
557 See for this Tor Inge Harbo, 2008, 168.
558 Lukas Oberndorfer, for example, is of the opinion, that the criticisms in Viking and Laval concerned only on the way how the Court employed the principle of proportionality but the principle as such was not called into question,
559 http://www.etuc.org/IMG/pdf/social_progress_protocolEN.pdf.

> TFEU, are intended to promote improved living and working conditions "so as to make possible their harmonisation while the improvement is being maintained" and expressly calls for a "Social Progress Protocol" to be included in the Treaties in order to enshrine the principle of the equal value of fundamental social rights and economic freedoms and thereby make it clear that neither economic freedoms nor competition rules should be allowed to take precedence over fundamental social rights, and also to clearly define the impact of the Union's objective of achieving social progress[560]".

Brian Bercusson takes the view that the EU fundamental right to collective action should have priority over fundamental market freedoms. Derogations from the fundamental right to collective action should only be allowed exceptionally, applying the principle of proportionality[561]. In order to strengthen their view , the trade unions also refer to the recent case law of the ECtHR in *Demir and Baykara[562] and Enerji Yapi -Yol[563]* where it was found that any interference with the freedom of association is presumptively unlawful and needs to be justified. Here, it is important to pay attention to the different approaches of the CJEU and ECHR when dealing with derogations from the right to strike.[564] Under European human rights law, the point of departure in the assessment of the ECtHR is the principle of freedom of association as enshrined in Article 11 of the ECHR, which extends to the right to collective bargaining and the right to strike. Any derogation from the right to strike must be justified by economic arguments. From this it becomes clear that the approach of the CJEU is at odds with the approach of the ECtHR, as in the case law of the CJEU any derogations from economic rights have to be justified on human rights grounds. The trade unions take the view, the CJEU should adopt the approach of the ECtHR.[565]

The Viking and Laval judgments are also critisized by the ILO. The ILO´s Committee of experts considered that " it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom

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[1] *OJ C 376, 22.12.2011, p. 74.*
[561] See for this Christophe Vigneau 2009, 389.
[562] ECtHR, Demir and Baykara, no. 34503/97.
[563] ECtHR, Enerji Yapi-Yol Sen v. Turkey, no. 68959/01.
[564] see for this Deakin, Rogowski, Reflexive labour law, capabilities and the future of social Europe 2011, 246.
[565] See for this: Barnard, Free Movement and Labour Rights, Squaring the Circle 2013, 17.

of establishment or freedom to provide services [566]. The Committee "considered that the doctrine that is being articulated in these CJEU judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.

The approach suggested from behalf of the ETUC after which social rights should prevail over economic freedoms seems to be from the point of view of the trade union movement comprehensible as they were hit hardest by the rulings of the CJEU in the Laval quartet. But this approach is rather not compatible with the concept of the social market economy in the sense of Article 3 III 2 TEU. The social market economy in the sense of Article 3 III 2 TEU stands for the parity of social and economic interests. "A simple reversal of priority would leave its proponents open to similar accusations made by trade unions against the current approach: it is asymmetrical and formalistic and embodies a one- dimensional view of the European Union[567]"

In addition, against the background of the improbability of European policy responses in the social field it is rather doubtful whether a protocol with the above described content will ever be adopted. As a matter of fact and from the point of view of the social market economy in the sense of Article 3 III 2 TEU it is more reasonable to adhere with the principle of proportionality and to further develop its application, in particular to industrial relation cases[568]. As regards this subject, Barnard proposes to urge the CJEU to adopt a margin of appreciation approach[569]. In her point of view, the Court could delegate the decisions on proportionality to the national courts to be decided according to their domestic standards, albeit while complying with their duties of cooperation under Article 4(3) TEU to consider the EU implications.

A more promising approach would be to make changes to the application of the principle of proportionality itself. As regards this subject, the principle of proportionality as applied by the BVerfG could serve as a model for the CJEU. The BVerfG sees fundamental rights as principles which necessitates to balance the conflicting fundamental rights. It is important to

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[566] Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010, 209.
[567] Barnard E.L. Rev. 2012, 129.
[568] See for this Barnard, Free Movement and Labour Rights: Squaring the Circle? 2013.
[569] See for this Barnard, Free Movement and Labour Rights: Squaring the Circle? 2013.

recall, that the application of the proportionality in the narrow sense requires that the suitability and necessity of the relevant measure are affirmed[570]. When comparing the principle of proportionality as applied by the CJEU to assess the compatibility of national legislation with EU law and the application of the proportionality test by the BVerfG it becomes clear that the CJEU is not balancing at all, as it only applies a two limbed test to proportionality. The application of the proportionality in the narrow sense has the potential to bring about more comprehensible judgments. The illustrated case law of the BVerfG showed that concerns of fundamental rights holders find particular consideration in the last step of the proportionality test. Thus, the application of the proportionality test in the narrow sense would strengthen the efforts of the Member States to meet their social commitments resulting from their constitutions as well as international human rights instruments they are signatories to. The Advocate General Trstenjak in Commission vs. Germany has shown that the application of a three limbed proportionality test to assess national legislation is quite possible to be practiced in internal market law.

5.Application of Practical Concordance

The CJEU has been accused of having created a hierarchy between fundamental economic freedoms and fundamental social rights[571]. A way to correct this situation would be to not apply the precept of rule and exception in situations where fundamental market freedoms and fundamental rights are in conflict. The constitutionalization of the social market economy but also the legally binding CFREU supports this view. The German experience could also here serve as a model. To recall, the European economic constitution and the economic constitution of the Basic law have in common, that both are based on a precept of rule and exception. In both jurisdictions economic freedoms constitute the rule and social state interventions exceptions requiring justification. Under German law, as was shown, the precept of rule

[570] Although rejecting the necessity of the Tarifumwandlungsgesetz, the Advocate General in Commission vs. Germany continued to apply the last step of the proportionality test, the proportionality in the narrow sense. The same approach is followed by Catherine Barnard, see This approach does not comply with the application of the principle of proportionality as carried out by the BVerfG.

[571] See Opinion Advocate General Trstenjak, Commission vs. Germany, para 81.

and exception finds only application in cases where the state encroaches upon fundamental rights, in other words, if the public interest is in conflict with private interests. Conversely, the precept of rule and exception finds no application when two fundamental rights collide. In such a situation, the Court applies the doctrine of practical concordance. The advantage of this approach is, that there is no hierarchy between the colliding fundamental rights but both fundamental rights have the same value. Moreover, both fundamental rights are considered as rules and accordingly the strict proportionality test finds no application. The legally binding character of the CFREU makes it necessary to treat fundamental rights and fundamental market freedoms equal. The doctrine of practical concordance might also be employed by the CJEU. As was shown, the aim of practical concordance in situations of conflicting rights, is to avoid to the fullest extent possible, sacrificing one right against the other, and instead seeking a compromise between the rights in conflict which will respect their respective claims, by optimizing each of the rights against each other. It should be noted that the application of the principle of practical concordance is like the principle of proportionality not uncontested. De Schutter argues that in the frame of practical concordance judges have privileged access to where the equilibrium between the conflicting rights is to be found[572]. According to that, it is for the judge to decide whether or not the rights in conflict have been reconciled by the legislator to the fullest extent possible. Hös sees things similarly. She argues, that the practical concordance is problematic as it gives the Court and also national authorities a constitutional role, that of taking a value judgment in the name of a constitutional ideal[573]. From this it becomes clear, that, the critique mainly refers to the requirement of optimization of rights which is not only reflected in the principle of proportionality but also in the doctrine of practical concordance.

Notwithstanding this critique, the idea of practical concordance found already entrance in the case law of the CJEU, namely in Schmidberger and to a certain extent in Commission vs. Germany. In the latter, the idea of practical concordance is also reflected in the opinion of the Advocate General Trstenjak who referred in her opinion also to Schmidberger. As was shown,

[572] De Schutter/Tulkens 2007, 33.
[573] Hös, 2009, 12.

Schmidberger was about a conflict between a fundamental market freedom and a political fundamental right. In its reasoning, the Court did not apply the precept of rule and exception in favour of the relevant fundamental market freedom but treated the conflicting rights as having equal rank. The valorization of the social dimension of the EU speaks in favour of extending this line of reasoning of Schmidberger to conflicts between fundamental market freedoms and fundamental social rights.

6. Fundamental Social Rights as Self-Standing Justification Grounds

As was already pointed out, the CJEU considers the freedom on the market as a rule and social state interventions as exceptions requiring justification. In this regard it is of utmost importance under what type of exception ground social state interventions are classified. The CJEU does not pursue an uniform line. In Viking, the right to strike was not considered as a self-standing justification ground[574] but only as a an overriding reason of the public interest. The Court pursued the same way of reasoning in Laval. Against the background of the legally binding CFREU, it is arguable whether the degradation of fundamental social rights to overriding public interest concerns can be still maintained. As stated before, the CFREU contains fundamental social rights like Article 28 or Article 31 which do not have the character of mere principles but are considered proper rights. These fundamental social rights offer protection against the EU and the Member States and they can be directly invoked by fundamental rights holders. The categorization as a fundamental right gives the relevant position more weight than a "rule of reason" which has amongst others implications on the application of the principle of proportionality. The CJEU is required to take the CFREU serious. Accordingly, the Court should classify fundamental social rights as self-standing justification grounds. By doing so it would eliminate the established hierarchy between fundamental market freedoms and fundamental social rights. In this regard reference must be made to Schmidberger. As was shown, the Court treated in this case the freedom of expression and the freedom of assembly not as a rule of reason, but as a self standing justification ground. This approach should be extended to

574 See for this Vries, The protection of fundamental rights within Europe´s internal market after Lisbon- An endeavour for more harmony 2010, 7.

fundamental social rights. It would dogmatically imply that the strict precept of rule and exception will not find application between fundamental market freedoms and fundamental social rights. This approach would contribute to achieve the objective of the social market economy in the sense of Article 3 III 2 TEU.

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